TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. 59

HENRY FERGUSON, PETITIONER,

vs.

MOORE-McCORMACK LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 7, 1956
CERTIORARI GRANTED MAY 21, 1956

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—859-9

[fol. a] **UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF NEW YORK

SEAMAN'S ACTION

HENRY FERGUSON, Plaintiff,

AGAINST

MOORE-McCORMACK LINES, INC., Defendant

COMPLAINT—(PLAINTIFF DEMANDS A TRIAL BY JURY)—Filed August 15, 1950

Action by Seaman Under Special Rules for Seamen to Sue Without Prepayment of Costs or Fees, for Enforcement of Laws of the United States, Protection of Health and Safety at Sea:

The plaintiff, by George J. Engelman, his attorney, complaining of the defendant, alleges upon information and belief:

First: That at all the times hereinafter mentioned, the above named defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and at all said times was and is doing business in the State of New York, with an office for the regular transaction of business within the jurisdiction of this Court.

Second: That the plaintiff is a seaman and this action is brought to recover damages for personal injuries under a Federal Statute, to wit, Section 33 of the Merchant Seamen's Act of June 5, 1920, amending Section 20 of the Seamen's Act of March 4, 1915, and jurisdiction herein is claimed by virtue of said statute.

Third: That during all the times hereinafter mentioned, the defendant owned, operated, managed, controlled, provisioned and supplied the Steamship BRAZIL.

[fol. b] Fourth: That at all the times hereinafter mentioned, the Steamship BRAZIL was and still is employed as a merchant vessel.

Fifth: That at all the times hereinafter mentioned and more particularly from on or about February 23, 1950 to

and including April 3rd, 1950 plaintiff was in the employ of the defendant aboard said Steamship BRAZIL as a seaman (asst. baker & confectioner), and defendant employed the plaintiff aboard said Steamship in said capacity during said times.

Sixth: That on or about March 24th, 1950, while the plaintiff was engaged in the course of his duties aboard the Steamship BRAZIL in attempting to free from its container, ice cream which was excessively frozen, so that the same could be served, he was caused to sustain serious and permanent personal injuries.

Seventh: Plaintiff was injured as aforesaid, wholly and solely through the negligence of the defendant, its agents, servants and employees and without fault on his part, in failing and neglecting to provide the plaintiff with a safe place in which to work; in failing and neglecting to provide him with safe and competent superiors, fellow servants and co-employees; in failing and neglecting to take the customary steps to protect the plaintiff's person; in failing and neglecting to carry out the work in a safe and proper manner and through the negligence of the defendant's agents, servants and employees.

[fol. c] Eighth: That by reason of the said personal injuries, plaintiff has been disabled, has suffered and will suffer physical pain and mental anguish, has been and will be prevented from attending to his work, has lost and will lose sums of money which he otherwise would have earned, and has been obliged to undergo medical care and attention and is still undergoing the same and plaintiff will be permanently injured, all to his damage.

Plaintiff for a Second Cause of Action Realleges and Reiterates Each and Every Allegation Hereinbefore Set Forth and in Addition Thereto Alleges:

Ninth: That by reason of the said occurrence and the injuries plaintiff thereby sustained, plaintiff has been and will be required to spend large sums of money for his maintenance and cure.

Tenth: That by reason of the allegations in the two causes of action of this complaint plaintiff has been damaged in the sum of $50,000.00.

Wherefore, plaintiff demands judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000.00) together with the costs and disbursements of this action.

George J. Engelman, Attorney for Plaintiff, O. & P. O. Address, 44 Whitehall Street, Borough of Manhattan, City of New York.

[fol. d] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER—Filed September 19, 1950

Defendant Moore-McCormack Lines, Inc., by its attorneys, Dow & Symmers, for its answer to the complaint, alleges upon information and belief as follows:

As to the First Cause of Action:

First: Defendant admits that it was and still is a Delaware corporation, with an office within the Southern District of New York; that it operated the SS BRAZIL, an American merchant vessel, on which it employed plaintiff as a seaman under a special bareboat charter from the United States of America, as owner; but except as admitted defendant denies the averments of Paragraphs First, Third, Fourth and Fifth of the complaint; and defendant denies Paragraphs Second, Sixth, Seventh and Eighth of the complaint.

As to the Second Cause of Action:

Second: Defendant repeats and realleges the admissions and denials contained in Paragraph First herein with the same force and effect as if set forth at length herein and, in addition thereto, denies Paragraphs Ninth and Tenth of the complaint.

Defense:

Third: If plaintiff was injured aboard the SS BRAZIL at the time mentioned in the complaint or at any other

[fol. e] time, which is denied, such injuries were not due to any fault or neglect on the part of defendant, its servants, agents or employees but were caused solely by or were contributed to by the fault or neglect of plaintiff or were due to plaintiff's gross negligence, recklessness, vice or willful misconduct.

Wherefore, defendant prays that the complaint herein be dismissed with costs and that it may have such other and further relief as may be just and proper.

Dow & Symmers, By: Edward K. Reid, A Member of the Firm, Attorneys for Defendant, Office & P. O. Address, 70 Pine Street, Borough of Manhattan, City of New York.

[fol. f] UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

Civ. 60-187

HENRY FERGUSON, Plaintiff,

vs.

MOORE-McCORMACK LINES, INC., Defendant

Before: Hon. Edward A. Conger, D. J., and a Jury.

New York, February 7, 1955,
10:30 o'clock a. m.

Transcript of Testimony

APPEARANCES:

George J. Engelman, Esq., Attorney for Plaintiff.

Dow & Symmers, Esqs., Attorneys for Defendant; John R. Sheneman, Esq., of Counsel.

(A jury was duly impaneled and sworn.)

[fols. 1-2] The Court: We will take a recess for five minutes.

(Short recess.)

COLLOQUY BETWEEN COURT AND COUNSEL

(Mr. Engelman opened to the jury on behalf of the plaintiff.)

(Mr. Sheneman opened to the jury on behalf of the defendant.)

Mr. Engelman: I think that you have the original of the testimony of your witness, Sam Shaffran. We have a copy here and I would like to give the Judge one to follow it.

I would like to mark it for identification. I would like to read this deposition, if the Court please. Maybe I can use my associate, and I will read the questions and he will read the answers.

Mr. Sheneman: Would your Honor like the original?

The Court: No.

Mr. Engelman: May I have this marked for identification, please?

(Marked Plaintiff's Exhibit 1 for identification.)

DEPOSITION OF SAM SHAFFRAN

Mr. Engelman: This is a deposition of Sam Shaffran taken by the defendant pursuant to oral arrangements of counsel at the offices of Messrs. Dow & Symmers, 70 [fol. 3] Pine Street, New York City, on December 10, 1954.

APPEARANCES:

George A. Engelman, attorney for plaintiff.

Dow & Symmers, attorneys for defendant, by Frederick Fish, Paul Cherin and John R. Sheneman.

"SAM SHAFFRAN, called as a witness by defendant, having first been duly sworn by the Notary Public, testified as follows:

"Direct examination.

"By Mr. Fish:

"Q. Will you give the reporter your full name, please.

"A. Sam Shaffran.

"Q. Where do you live?

"A. Coaldale, Pennsylvania.

"Q. By whom are you presently employed?

"A. Moore-McCormack.

"Q. In what capacity?

"A. Refrigerating—chief refrigerating engineer.

"Q. You are presently the chief refrigeration engineer on the SS Brazil?

"A. That's right.

"Q. How old are you, Mr. Shaffran?

"A. 62.

"Q. How long have you been going to sea?

"A. Since 1920.

"Q. Have you been working for Moore-McCormack all [fol. 4] that time?

"A. No, sir.

"Q. What length of time have you worked for Moore-McCormack?

"A. Since 1933.

"Q. What was the first ship you went to work on, do you remember?

"A. The SS Levynathan.

"Q. What other ships of the company have you worked on since then?

"A. Manhattan, the American Banker, also, that is the U. S. Line; that is before I went with Moore-McCormack.

"Q. Do you recall when Moore-McCormack first had the Brazil for operation?

"A. I do not. I was on the Argentina.

"Q. When were you on the Argentina?

"A. I was on from during the way up until 1944.

"Q. She is a sister ship of the Brazil?

"A. That's right.

"Q. When did you first join the Brazil?

"A. In 1948.

"Q. Have you been on her ever since?

"A. Ever since, right.

"Q. So in 1950, you were the chief refrigeration engi- [fol. 5] neer on the Brazil?

"A. That's correct.

"Q. Do you hold any papers from the Coast Guard, licenses or anything of that sort?

"A. That is the only thing that I hold is the refrigerating engineer papers.

"Q. You have held those papers for how long?

"A. Since they began to issue. What year, I don't recollect.

"Q. We are concerned here this morning, Mr. Shaffran, with an action which has been brought by Henry Ferguson, who has alleged that he was a baker on the SS Brazil and that he received injuries in March of 1950, more particularly on March 27, 1950. Our records indicate that that was on Voyage 15. Do you recall any accident or injury to Mr. Ferguson?

"A. I do not. I don't know the man and I don't know anything else.

"Q. Mr. Ferguson is sitting here at Mr. Engelman's right. Do you recall having seen him before?

"A. I don't think so, because I don't look at the people when I work around.

"Q. He might have been on the vessel, though, at that time; he might have been working in the steward's department at that time?

[fol. 6] "A. That's pretty hard for me to say.

"Q. You don't know?

"A. I don't know. It's pretty tough for me to say that, because I don't pay no attention to nobody else but my own business.

"Q. Had you heard on that voyage of any accident happening up there in the bake shop?

"A. I do not know.

"Q. What, in general, was the nature of your duties on that voyage?

"A. My duty is to keep the things operating in proper manner.

"Q. By 'things,' what are you referring to?

"A. All the machinery; that is really to keep the stuff fresh and also chilled to a certain temperature that is called for on board the ship.

"Q. I assume that since you have said that you were refrigeration engineer, that this machinery that you have

referred to is concerned with the refrigeration apparatus on the vessel?

"A. That's right, only refrigeration; not otherwise.

"Q. Did you keep records of temperatures in the various refrigeration compartments?

"A. Ones that has thermometers, yes. Ones that ain't got it, no.

[fol. 7] "Q. Do you recall where ice cream was stored on this vessel?

"A. The Port of New York.

"Q. It was loaded in the Port of New York and then where was it placed on board the vessel, what compartment?

"A. The ice cream box.

"Q. Where was that located?

"A. Otherwise, you would call it a service box.

"Q. Where was that?

"A. That is the baker's service.

"Q. There were two places?

"A. No; one.

"Q. Where was it stored when it was brought on board at New York?

"A. Stored away in a container, the main box down in the bottom, 'D' deck.

"Q. Did you have any recording thermometer for that box on 'D' deck when the ice cream was stored?

"A. At that time we didn't have it; only mercury hanging on the wall.

"Q. Did you make any record of what that mercury thermometer showed in the ice cream box?

"A. It was pretty hard; I had no keys to that box, no.

[fol. 8] "Q. We have here some records which purport to show various temperatures that were recorded on the voyage. This document is entitled 'Refrigerating Engineer's Day Log.' Do you recognize that paper?

"A. I do.

"Q. What is that?

"A. That is the day log.

"Q. Was that kept by you?

"A. That is kept by me and another man that works there; there is three of us.

"Q. I notice the signature down here is 'S. Shaffran.'

"A. That is correct.

"Q. You signed those records?

"A. Yes.

"Q. And those are your records for the dates of March 26th and March 27th; is that correct?

"A. Right.

"Q. Do those records show the temperatures for the box where the ice cream was stowed at New York?

"A. No, sir.

"(Two page document entitled 'Refrigerating Engineer's Day Log, dated March 26, 1950, and March 27, 1950, marked Defendant's Exhibits 4A and 4B, respectively, [fol. 9] for identification, as of this date)."

Mr. Engelman: I would like to offer them in evidence.

Mr. Sheneman: No objection.

(Marked Plaintiff's Exhibit 2.)

Mr. Engelman: I would just very briefly wish to read part of this, if I may.

These two pieces of paper, Plaintiff's Exhibit 2, are both styled "Refrigerating Engineer's Day Log." They are entirely similar in form. One is for March 26th and the other is for the 27th of March, and they show that various temperatures were kept by the refrigerating engineer.

Listed here is the vegetable box, fish box, icebox, meat box, second meat box, fruit box, second fruit box, dairy box, and a wine larder; and it shows that from twelve to four, four to eight, eight to twelve, twelve to four, four to eight and eight to twelve, both a. m. and p. m., that the temperatures of those boxes designated were recorded.

(Reading of deposition continued as follows:)

"Q. From having observed that mercury thermometer on occasion and from your knowledge of the way in which this machinery on the vessel was operated and maintained [fol. 10] can you give us your best judgment as to the temperatures that were in general maintained in the storage box on 'D' deck?

"A. The best I can give you is that when it was reported that the ice cream was soft, I would go down there and check and see what was wrong.

"Q. Do you recall looking at the temperatures in that box at any time?

"A. Without getting a report, no. I had no key to the box, so I would have to run around.

"Q. Have you any recollection as to what the general temperature was that was maintained in that box?

"A. The closest I can give you, anywhere when the machine stopped, I know if she had proper gas that the temperature would be around zero to 5.

"Q. Is that the temperature you were aiming for?

"A. That is the temperature to hold steady.

"Q. Do you know where the ice cream was taken from that box for purposes of service to either the passengers to the crew?

"A. Where else could it be taken, but from the main box?

"Q. It would be taken from the main box; where was it taken to?

"A. I guess in the only place where they use it.

[fol. 11] "Q. Where was that?

"A. They would use it, I guess, for passengers and the crew.

"Q. You say the ice cream was taken out of that box on 'D' deck?

"A. Yes.

"Q. Do you know where they served it?

"A. That is in bakers', where they have a box there to serve it from.

"Q. Where was that bakers' box?

"A. In the galley, in the bakers' shop.

"Q. I show you a set of photographs that have been marked for identification as Defendant's Exhibits 2A, B, C, D, E and F and ask you if you can tell us what those photographs are (handing to witness)?

"A. What do you want to know?

"Q. You have referred to a box in the bake shop.

"A. That's right.

"Q. Does that box appear in any of these photographs?

"A. Yes.

"Q. And you now refer to Exhibit 2A; does that show the box?

"A. Right there is what you."

Mr. Engelman: I think this set has been introduced. What does your 2-A show that to be?

[fol. 12] (Mr. Sheneman hands photographs to Mr. Engelman.)

Mr. Engelman: Would one set be enough to introduce? Suppose I introduce my set?

Mr. Sheneman: No objection.

Mr. Engelman: I will offer these photographs in evidence.

(Six photographs marked Plaintiff's Exhibit 3.)

The Court: Let me see them.

(Exhibit handed to the Court.)

Mr. Engelman: While we are doing that, this is the box as testified to by the witness.

The Court: I think you ought to designate them somehow or other.

(Marked Plaintiff's Exhibits 3-A, 3-B, 3-C, 3-D, 3-E and 3-F.)

Mr. Engelman: 3-A is the photograph referred to by the witness.

(Reading of deposition continued as follows:)

"Q. That shows the box, does it, or does it not?

"A. That shows the box.

"Q. I ask you about Defendant's Exhibit 2E; does the box appear in that photograph?

"A. That is closed and a part of the bottom."

Mr. Engelman: This is the next photograph referred [fol. 13] to by the witness.

The Court: Which one is that?

Mr. Engelman: This is Plaintiff's Exhibit 3-C.

The Court: What does that show?

Mr. Engelman: That shows the bottom of the dispensing box.

The Court: Let me see it.

(Exhibit handed to the Court.)

The Court: You said something about it being closed, is that right?

Mr. Engelman: Yes.

The Court: All right.

Mr. Engelman: Referring to the top.

The Court: Yes.

Mr. Engelman: It shows the doors to open up to serve the ice cream.

(Reading of deposition continued as follows:)

"Q. Is that the box in that picture?

"A. That is closed—that is the closed box, yes.

"Q. The box is closed?

"A. Yes.

"Q. I also show you a photograph marked 2C.

"A. That is the box and the grating outside, and the box not in use."

[fol. 14] The Court: That is what exhibit?

Mr. Engelman: This is Plaintiff's Exhibit 3-D that the witness is referring to.

The Court: Let me see it.

(Exhibit handed to the Court.)

The Court: All right.

Mr. Engelman: This is another view showing the dispensing cabinet here. The refrigerating equipment as it is now located is here (indicating).

The Court: All right.

(Reading of deposition continued as follows:)

"Q. Can you tell us, in 1950, what the refrigerating apparatus was for that box? Did you have any machinery there in connection with that box in 1950?

"A. I could not tell you whether any machinery was there at that time or not.

"Q. We notice in this picture, high in the bulkhead what appears to be a motor and other apparatus on a shelf. Can you tell us what that is?

"A. That there is a motor and compressor and a condenser, a machine to refrigerate.

"Q. That motor and condenser and refrigerating machinery was used to keep what apparatus cooled?

"A. Ice cream.

"Q. The ice cream box that is closed in that picture?

[fol. 15] "A. Yes.

"Q. At some time, was the machinery in a different place?

"A. Correct.

"Q. Where was that?

"A. The open part at the bottom.

"Q. This photograph indicates an open space underneath the ice cream box. Is that the area you are referring to?

"A. That is the area."

Mr. Engelman: The area to which he is referring, where the refrigerating apparatus previously was is where I have the point of my pen. Do you all see that?

(Reading of deposition continued as follows:)

"Q. Do you know when the refrigerating apparatus was shifted from that open area up onto the shelf?

"A. I do not.

"Q. Do you know why that was done?

"A. Because it kept the ice cream too soft. There was too much heat on the bottom of this thing and it kept the ice cream too soft, so the company had it shifted up there.

"Q. That heat came from where?

"A. From the compressor and the motor.

[fol. 16] "Q. If any trouble developed in connection with the refrigerating machinery, whose duty was it to make repairs?

"A. Mine.

"Q. Was it yours or some person under your supervision?

"A. Until I give orders.

"Q. It was under your direct supervision?

"A. That's right.

"Q. Do you recall an occasion, having had any work to do in connection with this box in the pantry?

"A. As soon as I get notified, I go right ahead and try to fix it, to the best of my ability.

"Q. When would that be done?

"A. Any time that I had time to do it, and when they were not busy around there.

"Q. Can you tell us whether or not that box in the pantry was maintained in operating condition during the voyage which would include March 27th?

"A. Well, if the machinery was there, it must be.

"Q. What is your best recollection?

"A. I could not say it either way. It what way do you mean?

"Q. Was there any period of time in which this box was out of operation on that voyage?

[fol. 17] "A. I don't recollect for any length of time.

"Q. Can you tell us whether there was any occasion when the box went out of commission and you could not fix it?

"A. Not that bad. We always tried to keep up the operation of the things, otherwise they wouldn't have to carry it.

"Q. Can you tell us what your best recollection is as to whether you did that?

"A. I suppose if that machine went out of order and we could not fix it, then they would not fetch the ice cream up there. We would give them the order not to fetch it up.

"Q. Do you recall whether there was any such occasion?

"A. No.

"Q. Do you recall any repairs having been made to this machinery at the Port of New York?

"A. May I ask you what date, because it is pretty hard for me.

"Q. On the voyages immediately before and immediately after March 27th, when the vessel was in the Port of New York; do you recall any repairs being made at that time?

"A. Naturally, when we get into New York we generally [fol. 18] have a shore gang check that up first. We always put in for that and that is the shore gang and we expect that at least they will have three days to work on it under that supervision.

"Q. I show you two specifications of repair work which have been furnished to me by the company, they are copies only, and ask you whether those two documents refresh

your recollection as to any repairs that may have been made in New York?

"A. Yes, that was made.

"Q. You have looked at both of those documents.

"A. That was also checked by my electricians.

"Q. Can you say whether or not the repairs indicated in those two documents were made at the times indicated?

"A. I could not say at that time; that is a pretty hard proposition. It was made pretty near every day. At that time I have trouble with them machines and I have trouble today with them things.

"Q. When you have trouble, you say you go to work on them?

"A. That's right.

"Q. When you come to New York, sometimes repairs are made?

"A. Are made by shore gangs.

[fol. 19] "Q. But you don't recall what repairs, in fact, were made?

"A. No, not exactly."

Mr. Engelman: Then you had these two documents marked for identification. I am not going to offer them, but do you want to offer the originals, if you have them?

Mr. Sheneman: I may offer them later.

Mr. Engelman: This is cross-examination.

The Court: By whom?

Mr. Engelman: By yours truly.

(Reading of deposition continued as follows:)

"Q. Mr. Shaffran, what year did you go to work for Moore-McCormack?

"A. 1933. I came in with the ships.

"Q. What was your rank when you first went to work for Moore-McCormack?

"A. I was third freezer—second freezer, rather.

"Q. After you were third freezer for a while, they promoted you to second freezer?

"A. That's right.

"Q. And then after some years you were promoted to first freezer, I take it?

"A. Right.

"Q. And then some years after that, you were promoted [fol. 20] to refrigerating engineer?

"A. No. There is only three. You have got four mixed up in there.

"Q. There are three ranks: first, second and third freezer?

"A. Chief, first and second.

"Q. Does the United States Coast Guard issue certificates for first, second and third freezers?

"A. No. They issue just for refrigerating engineer.

"Q. Do you have to take an examination to get the ticket?

"A. That's correct.

"Q. Did you ever take a course in a maritime school on refrigeration work?

"A. I have worked on the outside, before I went to sea.

"Q. So you got your experience in the practical field rather than in school?

"A. I got mine the hard way.

"Q. When you went on the Brazel were you first freezer there?

"A. I was on the Argentina as first freezer during the war.

"Q. When did they transfer you to the Brazil?

"A. I went to the hospital; I was run down after the [fol. 21] war.

"Q. When you got out of the hospital, you joined *joined* the Brazil?

"A. That's where the company wanted to send me over.

"Q. About what year was that?

"A. 1948.

"Q. You went on there as first freezer?

"A. Chief freezer, that's right.

"Q. And you have been on there ever since?

"A. Correct.

"Q. As chief freezer on the ship, your job is to keep the refrigeration machinery in running order, is that right?

"A. That's right.

"Q. We are speaking of an occurrence back in March of 1950. You have no particular or distinct recollection of your work on this voyage in March of 1950, as distin-

guished from all the other voyages you have made, have you, Mr. Shaffran?

"A. In what way do you classify that?

"Q. Is there anything that happened in connection with your work——.

"A. Anything in refrigeration, I go right ahead and do the repairing.

"Q. You do that on every voyage?

[fol. 22] "A. On every voyage.

"Q. That is part of your job?

"A. That is my job.

"Q. I say, is there anything that happened on the voyage of March, 1950, with respect to the ice cream freezing apparatus that sticks out in your mind, so as to distinguish it from the other voyages?

"A. I don't remember. In that way, no.

"Q. The ice cream is brought aboard at New York and is stored in 'D' deck, is that right, sir?

"A. Yes.

"Q. In a box?

"A. Yes.

"Q. Would you describe the box, please, Mr. Shaffran?

"A. The ice cream box is inside an ice box.

"Q. How was it refrigerated?

"A. The refrigeration is outside the box and it is naturally worked by coil and gas to cool off inside.

"Q. Your coils become frozen with ice on the surface, is that it?

"A. Correct.

"Q. And that is made cool by gas under pressure?

"A. Correct.

"Q. On your direct examination, when you were asked about a thermometer, I understood you to say that at that [fol. 23] time they had no thermometer there, but they had mercury hanging on the wall.

"A. The same as you have got in a house, one of them. Have we got one here?

"Mr. Fish: Not in here.

"The Witness: This is air conditioned, so it is all right.

"By Mr. Engelman:

"Q. When you say 'mercury,' you mean a thermometer registered by mercury; is that it?

"A. Mercury hangs by itself; the natural air lowers and highers it.

"Q. Did it have a scale on it and the glass?

"A. Glass on it and the mercury inside.

"Q. It would rise and fall with the change of temperature?

"A. That's right.

"Q. But on this voyage of March, 1950, you made no readings of the temperature in this ice cream box?

"A. And perfect, we never made any until we got one that really reports right. We never get in. I had no key to that box, to no box.

"Q. When you wanted to get in that box, where did you get the key?

"A. I would go up to the baker, to the man that had the key. The only man that had the key was a baker.

[fol. 24] "Q. Was that a man by the name of Vozzi?

"A. I don't know his name. I don't know him a damn thing or who he was.

"Q. How often would you go in the box, once a week?

"A. When I would get called that there was trouble, I would go in.

"Q. Otherwise, you wouldn't go in?

"A. If there was no trouble.

"Q. In other words, no one ordered you to keep this ice cream box at a certain temperature, did they?

"A. No.

"Q. The only time you went in there was when there was trouble and that would be when the baker would tell you to go in there and give you the key; is that right?

"A. He would go himself; I wouldn't unlock it. The baker would go in and unlock it and then I would go in.

"Q. You would go in with him?

"A. That's right.

"Q. What would you do when you got in there on those occasions?

"A. Well, check that temperature and start work on the machinery, to see what happened.

"Q. The machinery was outside?

"That's right.

[fol. 25] "Q. And you would have occasion to go in there about three or four times during a voyage?

"A. It might be done.

"Q. Well, I think you stated you had—on direct examination you told Mr. Fish that you had a lot of trouble with that equipment in those days and you still have some trouble with that equipment. Didn't you say that?

"A. Not with the main body; the ones that you are looking at right here.

"Q. When you say 'the main body,' you mean the refrigerating equipment that refrigerated the ice cream down on 'D' deck; is that right?

"A. That's right.

"Q. So that when you testified you had a lot of trouble with equipment at the time of the accident and you still have, you are referring to the equipment that refrigerates the ice cream chest up in the bake shop?

"A. No.

"Q. You are not referring to that?

"A. No.

"Q. What equipment are you referring to that gave you a lot of trouble?

"A. That's at the time in the years—that is the thing that happened up in the baker shop, which is the one they [fol. 26] had to change.

"Q. Is that equipment giving you trouble today?

"A. Today, no.

"Q. But it did give you trouble back in 1950?

"A. At that time, it did.

"Q. Mr. Shaffran, on these occasions when the chief baker would go down on 'D' deck into the ice cream room with you, what would he do in there?

"A. He would just say, 'Well, look, the ice cream is getting soft.' I would say, 'All right, we will try to get it hard. We will see what the matter is and check the machinery. Maybe it would get short of gas; there might be a leak.'

"Q. Did Vozzi ever give you an order to keep that ice cream room at a certain temperature? Did he ever say, 'I want it at so many degrees'?

"A. I don't recollect. No, I don't.

"Q. You don't think he did?

"A. No.

"Q. Did anyone else on the ship ever tell you to keep the temperature of the ice cream room down at 'D' deck at a certain temperature?

"A. As a rule, I knew the temperature myself to be kept. If it went wrong and they left the doors open or anything, that was pretty tough for me, too.

[fol. 27] "Q. The only way that you knew the temperature was when Vozzi would tell you that the ice cream was soft and then you would regulate your machinery so as to lower the temperature and make it hard; is that right?

"A. You couldn't regulare it until you checked for leaks first and repair it; there might be a leak.

"Q. Now, your machinery for refrigerating the ice cream chest down on 'D' deck, of course, is located outside the box; isn't that right, the compressor?

"A. Yes.

"Q. It is all located outside the box?

"A. That's right.

"Q. What kind of equipment is that?

"A. It's a small machinery.

"Q. Who manufactured it?

"A. Well, now, I looked on it and there was no name on that compressor, as far as that.

"Q. You looked on there and there was no name?

"A. No.

"Q. When was the steamship Brazil built?

"A. I guess she was built some time in 1929 or 1928; I don't know which.

"Q. It was the original equipment that was on the ship when she was built, wasn't it?

"A. It must have been, I guess.

[fol. 28] "Q. Was there any appliance outside of the ice cream chest down on 'D' deck, whereby you could tell, without going in the box, what the temperature would be inside the box, if your machinery was operating properly? Was there any such appliance?

"A. The only appliance would be, if the box would be closed, the doors closed, the machinery would naturally fetch down the temperature and cut out automatically.

"Q. There was nothing outside, whereby you could tell what the temperature was in the box, without going in?

"A. No.

"Q. So you would have to go inside the box to find out what the temperature was?

"A. Right.

"Q. And all you had in there was an ordinary household thermometer?

"A. That's right.

"Q. And that didn't go down below zero, did it, in its readings?

"A. Oh, yes.

"Q. How far down below zero did that thermometer go?

"A. The average I have found is about 5.

"Q. About 5 below zero is as far as it went?

"A. Yes, and then it cuts out.

"Q. You took temperature readings of other refrigera-
[fol. 29] tors on the ship, didn't you?

"A. Yes.

"Q. And you took temperature readings of what other boxes?

"A. The meat boxes, fruit boxes, milk box and what you call the walk-in box.

"Q. And you took those temperatures every day?

"A. Every day.

"Q. But you didn't take any temperatures of the ice cream box?

"A. The temperatures at them boxes is right, in my refrigerating report.

"Q. Just answer the question, Mr. Shaffran. You told us that you took temperatures of the milk box, the meat box, the chill box. Did you say vegetable box?

"A. Yes.

"Q. You took those temperatures every day?

"A. Yes.

"Q. You did that because you were ordered to do it and it was a part of your job; isn't that right, sir?

"A. Right.

"Q. No one ordered you to take any temperatures of the ice cream box, did they?

"A. No.

"Q. And that is the reason that you didn't take any

[fol. 30] temperatures in the ice cream box, isn't it, because you weren't ordered to do it?

"A. No, that is not the reason.

"Q. Then, why didn't you take a temperature every day in the ice cream box the way you did in the milk box and the meat box and these other boxes?

"A. Because I had them right in front of my machinery down below.

"Q. You had 'them'? What do you mean by 'them'?

"A. I had them recordings right there to show each one of them the temperature, electrical.

"Q. When you say 'them recordings,' you are referring to recordings of the meat box and these other three boxes; is that what you mean?

"A. The other ones is electrical instrument.

"Q. De-cribe this electrical instrument.

"A. Naturally, when you turn on a switch and then you have got each number on each box, it gi-es you the thermometer; it shows the points what temperature it is in that box.

"Q. In other words, on these other four boxes, the temperature of which you took every day, that was recorded electrically, you say?

"A. Yes.

"Q. Where was it recorded, outside the box?

[fol. 31] "A. Outside and down on the reefer flat.

"Q. So you didn't even have to go up into the meat box and the vegatable box to see what the temperature was; you could look on the reefer flat and see it?

"A. Correct.

"Q. But you didn't have that situation on the ice cream box, there wasn't any relectrical recording of that, was there?

"A. No.

"Q. So that you never knew what the temperature was in the ice cream box until the baker came down and opened up and you went inside with him, isn't that so?

"A. No.

"Q. Didn't you so testify on direct examination?

"A. I tell you—just hold it a minute. Don't get me balled up. That box, the door is open all the time. They go in three or four times in that ice cream box and that

ice cream box don't hold the temperature, because hot air goes in there.

"Q. Aren't they opening the meat box and the vegetable box and isn't there hot air going in there, too?

"A. Yes, and the temperature shows high and low.

"Q. But you didn't have that showing of temperature reading down on the flat with respect to the ice cream box, did you?

[fol. 32] "A. We didn't have the instrument there.

"Q. Who was your superior on the ship, your immediate superior?

"A. The chief engineer.

"Q. Did you ever ask the chief engineer to install an electric recording device which would have shown the temperature of the ice cream box down on the flat, the way it showed up on the meat box; did you ever ask him for that equipment?

"A. No.

"Q. This ice cream box, did that have a separate compressor or did it work on the same compressor that the meat and vegetable boxes worked on?

"A. A separate compressor.

"Q. Separate equipment?

"A. That's right.

"Q. Isn't it a fact, Mr. Shaffran, this compressor and equipment that was hooked up with your ice cream box down on 'D' deck, you had more trouble with that than you had with the other equipment that supplied refrigeration for the meat and vegetable and milk boxes—didn't you?

"A. In what way, please? What way do you mean?

"A. I mean mechanical trouble that would require repairs.

"Q. The only repairs would be required, I will say [fol. 33] that much, is a leak, gas leak.

"Q. The equipment that you had to refrigerate the ice cream box, could you so use it as to set a definite temperature of the ice cream box down on 'D' deck?

"A. No.

"Q. Did Vozzi, the chief baker, tell you that he wanted refrigeration in there to keep the ice cream hard, hard as a brick? Did he tell you that?

"A. I don't recollect. No, I don't think so.

"Q. Let's leave the box down on 'D' deck, the ice cream box, and go up to the bake shop and look at this equipment that is indicated in these photographs, Defendant's Exhibit 2, which Mr. Fish has shown you. As chief reefer on the ship, did you make a daily inspection of this equipment in the bake shop?

"A. I did do that every day.

"Q. What time of the day did you do it?

"A. About six o'clock in the morning. I am on the morning watch, 4:00 to 8:00.

"Q. What did your inspection consist of?

"A. My inspection consisted of to see if the things is operating right. If it ain't, I go ahead.

"Q. Did you keep a workbook?

"A. Most of that was in the log.

"Q. What log?

[fol. 34] "A. The log you have got here somewheres.

"Q. I haven't seen any log. What log are you referring to.

"Mr. Fish: The two sheets of paper that have been marked for identification, which have printed across the top of them, 'Refrigeration Engineer's Day Log.'"

Mr. Engelman: And that refers to these two sheets of paper here, Plaintiff's Exhibit 2, and the witness refers to various notations that were made beneath the readings of temperature.

(Reading of deposition continued as follows:)

"Q. Mr. Shaffran, on this paper here, which has been marked Defendant's Exhibits 4A and 4B, under the heading of 'Domestic Box Temperature,' there are various figures written in a vertical line after these words: 'Vegetable' is one column; 'Fish' is another; 'Ice' is 'Meat' with the letter 'P' is another column; 'Meat' with 'S' is another; 'Fruit' is another column, 'Fruit, A' is another column; 'Dairy' is another column.

"Now, the figures under those headings show temperature readings; is that right?

"A. What is written in pencil; correct.

"Q. But you have already told us, there were no readings made of temperatures made in the ice cream box?

"A. Correct.

[fol. 35] "Q. You came to the Brazil, you say, in what year, Mr. Shaffran?

"A. 1948.

"Q. The equipment that they have in the bake shop for refrigerating the ice cream chest is the same equipment that was on there when you came aboard the ship in 1948; is that right?

"A. I guess it must have been.

"Q. Some time after March of 1950, that is after this accident to Mr. Ferguson, this equipment on this platform was moved there; it had been down underneath in this space I am indicating with the point of my pen on this photograph; is that right, sir?

"A. Not so. That is brand new equipment up there.

"Q. This equipment——

"A. Is brand new.

"Q. I don't think you understood my question. We will come back to it. I am going to put an 'E' on Defendant's Exhibit 2C. Can you see that, Mr. Shaffran? Do you see that letter 'E' there?

"A. No.

"Q. Can you see the arrow pointing to the 'E' now? Can you see that, sir?

"A. Yes.

"Q. That arrow points to equipment which is used to [fol. 36] refrigerate the ice cream chest in the bake shop, is that right, sir?

"A. That's right.

"Q. The ice cream chest on the same photograph, I will put the letter 'C'. That indicates the ice cream chest, is that right, sir?

"A. That's right.

"Q. You said a minute ago that this equipment where the 'E' and arrow are is new equipment; is that right, sir?

"A. That is new machinery put up there.

"Q. When was that put up there?

"A. I do not know.

"Q. Approximately when?

"A. Approximately, I do not know.

"Q. Since you have been on the ship?

"A. Since I have been on the ship, but I do not know, because that was put on by the superintendent from the shore.

"Q. Before the new equipment with the 'E' was put there, you had old equipment which was in a different location, didn't you?

"A. That's right.

"Q. And the location of the old equipment was down here where I am putting my pen?

[fol. 37] "A. That's right.

"Q. And I will put an 'O' there to identify it. I think you told Mr. Fish, on direct examination, that with the old equipment down in the bottom of the box, because of the development of heat, they had a lot of trouble in maintaining the proper temperature in the ice cream chest; is that right, sir?

"A. Maintaining the right temperature in the ice cream box was too hot.

"Q. You would say that this—you have been on the Brazil for a number of years—you would say that this new equipment indicated in this photograph was put on within the last year or two, would you?

"A. I have no recollection. I do not know what year.

"Q. Let's go back to the time when they had the old equipment in this ice cream chest up in the bake shop. Was there any thermometer kept inside these boxes indicated in this photograph where the ice cream is kept, which would give the temperature readings?

"A. There is no thermometer inside there.

"Q. Was there any thermometer or any mechanical device in any part of the ship which would record the temperature readings inside these ice cream chests here?

"A. Well, I generally give them one of them wall ther-

[fol. 38] mometers to put in there, to find out the temperature; that's the only instrument.

"Q. You generally give them one?

"A. And they break it.

"Q. Who did you give it to?

"A. The chief baker.

"Q. You never saw one inside there on your inspection?

"A. I never saw one inside.

"Q. There was no mechanical equipment on any part of

the ship which would record the temperature inside those boxes?

"A. Not in those.

"Q. I gather from your testimony, Mr. Shaffran, that major repairs to all of this refrigerating equipment would be made when the vessel got in port; is that right?

"A. The major repairs, that's right.

"Q. So that when the ship is out at sea, you and your men would take care of only minor repairs or repairs necessary to keep the equipment in operation until you got into port?

"A. We always kept them in operation; that- what we are on there for.

"Q. To do the best you can?

"A. Yes, what machinery we have got, and we gener- [fol. 39] ally try to make it.

"Q. Mr. Shaffran, looking at these two papers designated Defendant's Exhibits 5A and 5B, which are statements of repair to the ice cream box in the bake shop, you have no recollection of ordering this repair, yourself, have you, the repairs indicated in those two statements?

"A. The one statement is really a part of electrical work and I don't do that. I check that and I report to the electrician and what is on the refrigeration, I go along and do the best I can."

The Court: I think that we will adjourn for lunch at this time. Don't discuss the case in the meantime and don't make up your minds about it, or talk to each other about it until it is submitted to you.

2:15 for lunch.

(Recess at 2:15 p. m.)

[fol. 40] AFTERNOON SESSION

(Jury in box.)

The Court: I think that I should explain at this time to the jury something about these depositions, perhaps, if you do not quite understand about them.

There is a procedure that is employed a great deal in this court, particularly in this type of case, because where you have a controversy arising over a ship, the hardest

witnesses in the world to get in court are sailors. They may be in Europe, in South America or some other place when the trial comes up, and so the rule of the court is that—and in most courts today, but we use it much more, particularly in these sailor cases—the rule is that if we want, as in this case, the engineer, he may be any place. We don't know where he is today. He may be on another ship, or one ship or another which is on the sea, and so the rule is and the custom is to take his deposition, and that is just as though he was sitting here.

The rule is that either side may take a deposition of any party or any witness upon notice to the other side.

Who took it in this case?

Mr. Sheneman: We did, your Honor.

[fol. 41] The Court: The defendant—the respondent, as they call them in these seaman cases—rather than plaintiff and defendant, it is libelant and respondent. Respondent served notice that they were going to take the deposition of this engineer. So on that day he is there and the attorney for the respondent is there and the attorney for the libelant is there.

So the moving party has the first opportunity and he asks the questions first. Before he was asked questions he was sworn by a notary public and then his testimony is perpetuated—I mean, you then have it. And usually objections to questions, particularly those that have to do with whether they are proper or not, are decided by the court. If they are leading questions or not, they should be straightened out there, I guess, but, at any rate, here it is.

Then when the time comes either party may use any or all of it, and that is what we are doing here now. It will facilitate things, and so that it looks more realistic, in some of these cases we put a man on the stand and a lawyer asks him the questions as though he were the witness testifying.

I think that I ought to make that clear to you because sometimes I think the judges and lawyers forget that laymen and laywomen don't know exactly what we are doing.

[fol. 42] And this testimony goes along the same as any other testimony in the case.

All right.

(Reading of deposition continued as follows:)

"Q. Part of this refrigerating equipment is electrical, isn't it?

"A. There is electrical and freon gas; that must be to keep the things cold.

"Q. When the repair required something electrical, that was something for the electrician; is that right?

"A. Right.

"Q. You have nothing to do with that?

"A. Correct.

"Q. Did you tell Mr. Fish, on your direct examination, Mr. Shaffran, that you still have considerable trouble with this equipment up in the bake shop, this refrigerating equipment up in the bake shop?

"A. The only thing, that is, it gets hot air in there and the ice cream gets soft; that's all.

"Q. You still have that condition today?

"A. The hot air gets in there; so how are we going to prevent it?

"Q. That is a matter for you, as a refrigerating man, sir, not for me.

"A. That is why we are worried about that.

[fol. 43] "Q. You haven't been able to correct it?

"A. And nobody else.

"Q. I didn't ask you that. You haven't been able to correct it?

"A. No.

"Q. Mr. Shaffran, as chief freezer on the ship, did you ever speak to the people who supply ice cream to the ship at New York about the temperatures that should be kept down in the ice cream box down in 'D' deck and up in the bake shop; did you ever talk to them?

"A. No, sir.

"Q. Did your boss on the ship or anyone representing Moore-McCormack, ever suggest that you talk to the ice cream people about what temperature should be kept in these boxes on the ship?

"A. No, sir."

Mr. Engelman: Then there is redirect examination by Mr. Fish and I presume that inasmuch as I started—in so far as I am concerned, I think we have covered the vital

parts of the testimony, but I assume that you would like the whole thing to be read.

Mr. Sheneman: I think it would be better.

Mr. Engelman: "By Mr. Fish:

"Q. Mr. Shaffran, I believe that in your cross examination, referring to the refrigeration machinery down in the [fol. 44] stowage box on 'D' deck, you said that the machinery would cut out automatically when the temperature got down to a certain point.

"A. Right.

"Q. Do you recall what that point was that it would automatically cut out?

"A. Well, whatever point we set.

"Q. Have you any recollection as to what point you set?

"A. It would be 5 below zero.

"Q. I think you also said that when you made repairs to refrigerating machinery, you noted that in your log?

"A. That's right, while on watch.

"Q. That was a part of your duties, to make such notations in your log?

"A. While on watch, yes.

"Q. I notice here on March 27th, for instance, there is an entry that reads, 'Repaired grind valve to No. 5 blower'; is that correct?

"A. Correct.

"Q. Did that have anything to do with the ice cream box?

"A. No, sir.

"Q. I ask you if these sheets are the balance of your [fol. 45] log for that voyage? They commence on the date of February 21, 1950, and they run through April 3, 1950, and each sheet appears to bear your signature.

"A. Correct.

"Q. That is your log, is it?

"A. As long as it bears my signature, it must be."

Mr. Engelman: I think, with your Honor's permission, I might explain about these other sheets. I don't have them but they were sheets similar to these two sheets that were marked Plaintiff's Exhibit 2, and they covered——

The Court: You mean exact copies?

Mr. Engelman: I think I should explain what I meant by the use of the word "similar," because that is vague. I

mean that the form of printing was similar and that they were made out or kept—in other words, these two sheets here are for March 26th and March 27th and they record the temperature readings and these other sheets do the same thing.

The Court: But are these the ones that came from the logbook?

Mr. Engelman: They all came from the logbook. These are part of the log and they refer to the day of the accident and the day before.

The Court: That is all I wanted to know. In other words, [fol. 46] they are not similar but they are the logbooks?

Mr. Engelman: They are the logbooks.

The Court: That is what I mean.

Mr. Engelman: The refrigerating logbooks.

The Court: I understand. Do you offer them in evidence?

Mr. Engelman: I have no reason to offer them but we were referring to about forty other sheets for the rest of the voyage.

The Court: All right.

(Reading of deposition continued as follows:)

"Recross-examination.

"By Mr. Engelman:

"Q. Mr. Shaffran, I just have a couple of more questions for you and then we can go.

"You told Mr. Fish that the machinery that re-refrigerated the ice cream box would automatically cut off when the temperature reached 5° below zero; do you remember that?

"A. Yes, sir.

"Q. Could you have set the temperature so that it would not have automatically cut off until it got down to 15° to 20° below zero?

"A. It can be set, yes, sir.

"Q. Who told you to set it at 5° below zero?

[fol. 47] "A. To keep that ice cream in shape for the people to use it.

"Q. Who gave you an order to set it at 5°?

"A. Myself.

"Q. You decided that?

"A. We are on the job all the time, so we should know when to set them. There is nobody else that tells us to set it.

"Q. Did any ice cream company ever tell you to do that?

"A. No, sir.

"Q. The refrigerating machinery would automatically go off when the temperature in the box reached 5°. When would it automatically go on?

"A. When it would go up 1°."

Mr. Engelman: It does not appear here but what I wanted is—may we stipulate five degrees below zero, is that right?

Mr. Sheneman: That is right, he said that previously.

The Court: Yes, that was in the last question.

(Reading of deposition continued as follows:)

"Q. The refrigerating machinery would automatically go off when the temperature in the box reached 5° below zero. When would it automatically go on?

[fol. 48] "A. When it would go up 1°.

"Q. This refrigeration engineer's day log, marked Defendant's Exhibits 4A and 4B, has your name on it and had the names of two other men, a man by the name of Ai and the other name looks like Toruadjo. These two men were also freezers, weren't they, on the ship?

"A. That's right.

"Q. You had three freezers?

"A. All together.

"Q. You were the chief?

"A. Yes.

"Q. You each stood a watch?

"A. Yes.

"Q. And, of course, as far as the entries on this log are concerned, you can only vouch for the entries that were made on your watch; isn't that right?

"A. For my own.

"Q. In other words, the entries made by the other men during the other 16 hours of the day, you don't know whether they were correct or not?

"A. There were not 16 hours.

"Q. You stand two four-hour watches; that is eight hours?

"A. Yes.

"Q. And each of the other men stand eight hours. What [fol. 49] happened on their watch, you don't know?

"A. Right.

"Q. So that when you said that this was a correct log of the ship's business, you were referring to your entries made on your watch?

"A. That's correct, and it would show otherwise, if there wasn't that them boxes don't go up no more than 3° or 4°. To my estimation and the way that log is made up, it is correct.

"Q. You can only say that it is correct during the hours that you were on watch; isn't that so?

"A. That's so.

"By Mr. Fish:

"Q. Is it a part of your duties to review the entire log for the day?

"A. It is a part of my duty to check on that, yes.

"Mr. Fish: That is all.

"By Mr. Engelman:

"Q. Mr. Shaffran, any electrical repairs that would be required to the ship's refrigerating equipment would not appear in this log, Defendant's Exhibit 4, would it?

"A. I would like a little more, please, so I can understand. I am not a college man. I am one of them hard farm hogs growed up.

"Q. I want you to understand the question and I will [fol. 50] withdraw it. You may recall a few minutes ago you told me that this refrigerating equipment, the equipment up in the bake ship, part of it was electrical; is that right, sir?

"A. That's right.

"Q. And that is indicated by these two sheets that Mr. Fish showed you, Defendant's Exhibit 5, showing electrical repairs; is that right, sir?

"A. There is parts that we don't bother; we call the electrician to do that.

"Q. So, aboard the ship you have electricians; right?

"A. That's right.

"Q. And if part of the electrical equipment of the refrigeration plant goes out, that is in their jurisdiction to repair that, isn't it?

"A. The electricians.

"Q. So that this log, your reefer log, would not show electrical repairs, would it?

"A. If it goes out of order on my watch, that goes in the log, the hour that that thing goes out.

"Q. If the equipment goes out, you say your log would show it?

"A. That's right.

"Q. But your log wouldn't show the reason it went out, [fol. 51] would it?

"A. Things happen, just like a bulb burns out in here.

"Q. Would your log show the electrical defect?

"A. You have got to put it down in writing.

"Q. You wouldn't know what the electrical defect was?

"A. I would just write it up that a certain instrument went out of order.

"Q. And let it go at that?

"A. And call the electrician.

"Q. If the equipment was still in operation and the electrical part of it wasn't properly working, you wouldn't know, would you, not being an electrician?

"A. I would know that much, if they wouldn't have no speed.

"Q. I say if it were operating, but it appeared to an electrician that the equipment, the electrical part of the equipment was not working right, but the whole machine was still in operation, you wouldn't know that?

"A. It would not operate.

"Q. You say it wouldn't operate?

"A. How is it going to operate, if a fuse burns out, there it is.

"Q. Did you keep a workbook on the ship?

[fol. 52] "A. The only workbook is that log.

"A. You didn't enter every particular repair in the log-

book, did you? There are some minor repairs that you didn't enter there?

"A. That is pretty hard to say.

"Q. Well, there were some minor repairs that you didn't enter in the logbook?

"A. I don't remember.

"Q. There may have been minor repairs?

"A. I still don't remember.

"Q. During the course of a day you do so much work that you just can't enter every little thing in the logbook, can you?

"A. I still don't remember them things.

"Q. There were ships on which you were a freezer, on which you kept a workbook, weren't there?

"A. Not a freezer; the day log is whatever we done."

Mr. Engelman: That was the conclusion of the examination.

* * * * * * *

(Papers handed to Mr. Engelman.)

INTRODUCTION OF ACCIDENT REPORT—PLAINTIFF'S EXHIBIT 4

Mr. Engelman: If the Court please, I would like to offer in evidence an accident report which was made in the [fol. 53] course of the ship's business.

On the bottom of the report, my adversary agrees that the pencil notations, which apparently were made there after the accident report was made—my adversary will stipulate that those are not part of the record and later on we will block them out.

The Court: Who made the accident report?

Mr. Engelman: The defendant made it aboard the ship.

The Court: All right.

Mr. Sheneman: It was signed by the doctor, your Honor.

The Court: All right.

Mr. Engelman: I will offer that with that provision that the bottom part may be blocked out with a piece of paper.

The Court: Let me see it.

(Papers handed to the Court.)

The Court: It is pretty hard to read it.

Mr. Engelman: I also agree that the top of this, on the front page, 1, 2, 3, 4, 5 lines—counsel for the defendant suggests that that be obliterated and I agree to that.

The Court: Is this another one?

Mr. Engelman: No, it is the same document.

[fols. 54-56] The Court: What should be obliterated?

Mr. Engelman: The first five lines here on the top, Judge, and you can see why (indicating).

The Court: Yes.

Mr. Engelman: And the pencil notation on the bottom, which is not part of the report, which was made by somebody in their office.

The Court: Yes.

Mr. Engelman: After the report was sent in.

The Court: Yes. Before it goes to the jury you will have to do something about it. They cannot see it. You may read it to them if you want to now.

(Marked Plaintiff's Exhibit 4.)

* * * * * * *

[fol. 57] Henry Ferguson, the plaintiff, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Engelman:

Q. Mr. Ferguson, will you keep your voice up so that you can reach me down here.

Are you the plaintiff or the party who has brought this lawsuit?

A. I am.

Q. How old a man are you?

A. Sixty years old.

The Court: How old?

The Witness: Sixty.

[fol. 58] Q. Sixty is your present age, is it?

A. That's right.

Q. Are you a citizen of the United States?

A. I am.

Q. Before this accident what was your business or occupation?

A. I was a baker.

Q. And prior to March of 1950, how long had you been a baker?

A. Since 1910.

Q. Were you a baker on merchant ships?

A. Yes.

Q. And I take it with the name of Ferguson you were born in Scotland?

A. That's right.

Q. And you became a naturalized citizen when?

A. On the 17th of August, 1945.

Q. In March of 1950, were you employed on the steamship Brazil?

A. I was.

Q. And will you tell us very briefly what kind of vessel that was?

A. It carried first class passengers.

Q. Where did she go?

A. To South America.

Q. Do you know about how many first class passengers she had?

A. There were various amounts.

Q. Could you tell us the capacity?

A. It had the capacity of 500 passengers.

Q. What was your job on the Brazil? What did you sign [fol. 59] on as?

A. Second baker.

Q. And as second baker, you were in the steward's department, is that right?

A. That's right.

Q. And what were your duties as second baker?

A. I made the bread and rolls in the daytime, and puddings and things that were used for desserts.

Q. You made breads of various kinds, is that it?

A. That's right.

Q. I think you said during the daytime you did that work?

A. That's right.

Q. And in the evening did you have any work of any kind to do?

A. I only had to serve the passengers for an hour.

Q. What hour was that?

A. From eight to nine.

Q. When you say serve the passengers, you don't mean that you would serve them as a waiter, do you?

A. No.

Q. What work did you do when you served the passengers from eight to nine?

A. The waiters would come and give me the orders for how many dishes of ice cream or cake or whatever they wanted and then I would serve them.

Q. You did this work in what part of the ship?

A. In the bake shop, in the serving counter.

Mr. Sheneman: What was the answer?

[fol. 60] Mr. Engelman: In the bake shop serving counter.

Q. Were you the only man that did this work of serving ice cream from eight to nine o'clock?

A. That's right.

Q. Do you claim to have met with an accident on the Brazil?

A. Yes.

Q. Tell us what date it happened.

A. 27th of March, 1950.

Q. What time did it happen?

A. Twenty minutes to nine at night.

Q. On what part of the ship did it happen?

A. In the bake shop where the serving counter was.

Q. And what kind of work were you doing at the time the accident happened?

A. I was serving ice cream.

Q. Will you tell the Court and jury slowly, in your own way, just how this accident came about?

A. When I went on watch that night there as a full tub and a quarter of a tub. The quarter of a tub was soft enough where I could use the scoop and serve it easily.

The Court: This was a tub of ice cream, I take it.

The Witness: That's right.

And when the quarter tub was finished, then I started [fol. 61] on the full tub, and that was a little hard on the top, but with a little force I could make—scoop—I could take the scoop and make little balls of ice cream and put them in the serving dishes.

And I done that until it was about halfways down, and the ice cream was so hard, it was as hard as a brickbat. And I looked for something whereas I could loosen the ice cream up to make the little—to use the scoop to make the little balls of ice cream. And the only thing I could find was a butcher knife. It was about a foot and a half from where I was serving. It was kept underneath the griddle.

And when I was using the knife I would just—I took the knife first and went around the side of the tub to let a little air through the ice cream, so as it would be soft, where I could take the scoop and make little balls and serve it on the silver dishes.

And then I take the knife and pierced the ice cream and make little pieces of ice cream, little particles of ice cream with the handling of the knife, just the point of the knife, and when this accident happened my hand—the point of the knife must have struck a piece of solid ice——

The Court: Strike that out. You can't testify to that.

[fol. 62] Q. Mr. Ferguson, in court we are not concerned with what must have happened or what you think happened.

The Court: Tell us what did happen.

Q. We want to know what did happen.

The Court: The point of the knife——

A. The point of the knife hit a piece of hard ice cream, and with the point of the knife being jarred with this hard piece of ice cream, my hand slipped down on the blade of the knife.

Q. And where was your hand cut?

A. On the——

Q. Suppose you illustrate with your left hand, because you have all the fingers of your left hand.

A. These three fingers here, the last joint on the fingers here, and this one was just pierced a little.

The Court: That is the third finger?

The Witness: That is the third finger. It wasn't cut right through.

Mr. Engelman: May we have the record show that the witness indicated the three joints close to the palm of the hand?

The Court: No, I don't think he did that.

Mr. Engelman: I understood——

The Witness: No, it was in the joint here.

The Court: You are right.

Mr. Engelman: Are you satisfied with that? I think [fol. 63] you have it described in the medical log of where the cuts were.

Mr. Sheneman: I saw what he did.

Q. Mr. Ferguson, I show you this photograph here, Plaintiff's Exhibit 3-C, and I ask you if that shows the place where you were working at the time this accident took place (handing)?

A. (After examining) That's right.

Q. And you will notice in that photograph, Plaintiff's Exhibit 3-C, a tub of ice cream. Was the ice cream you were working on in a tub or container?

A. It was in the same kind of container as it is on that picture there (indicating).

Q. And was that tub or container in the cabinet illustrated in that photograph?

A. Yes.

The Court: Show it to the jury now.

Mr. Engelman: Before I do that, does this photograph here—apparently I have got one of your pictures here. We have got them mixed up. Have you got one of mine?

Mr. Sheneman: Yes.

The Court: Put yours away so that we don't get them mixed up. They are both the same, aren't they?

Mr. Engelman: Almost, your Honor.

The Court: All right.

[fol. 64] Q. Does this picture here, Plaintiff's Exhibit 3-A, show the situation in better detail?

A. It is more clearer than this one (indicating).

The Court: Let me see them both.

(Exhibits handed to the Court.)

The Court: (After examining) All right. Show it to the jury.

(Mr. Engelman hands exhibits to the jury.)

The Court: I take it that there are two kinds of ice cream there, chocolate and vanilla?

The Witness: At the time that picture was taken it was just chocolate. That was taken about two years after the accident happened.

The Court: Yes, I know.

The Witness: And that just happened to be the ice cream——

The Court: Were there two kinds?

The Witness: No, there is only one kind.

The Court: What is the black mark on there?

The Witness: That was chocolate ice cream.

The Court: That is what I thought.

The Witness: And the black mark——

The Court: Let me see that again.

(Exhibit handed to the Court.)

Mr. Engelman: I know what your Honor is referring to. [fol. 65] I think that is just a coating of ice, Judge.

The Witness: That is a coating of ice in the cabinet.

The Court: Hand them up again.

(Exhibits handed to the Court.)

The Court: (After examining) Yes, I see it now. So it was chocolate ice cream?

The Witness: That's right.

The Court: All right.

By Mr. Engelman:

Q. Mr. Ferguson, this ice cream which you were working on at the time you had your accident, was it in a container such as are in these figures here, Plaintiff's Exhibits 3-E and 3-A?

A. Yes.

Q. Would you describe that container to us, what it was made of, and so forth?

A. Corrugated cardboard.

Q. About how tall was the container?

A. About twelve inches.

Q. About how wide was it?

A. About the same dimension.

Q. Do you know how much ice cream the container held?

A. Two and a half gallons.

Q. As you were working on this container was the container set in this box?

A. That's right.

[fol. 66] Q. Which is indicated in these two photographs?

A. That's right.

Q. Plaintiff's Exhibits 3-A and 3-E, is that right?

A. Yes.

Q. Did you understand my question?

A. Yes, si.

Q. And the answer is yes?

A. The container is just the same as that you have there now.

Q. But at the time you had your accident was the container inside the box?

A. Yes, sir.

Q. Or was it outside the box?

A. It was in the icebox.

Q. Now you said that when you started to work with this ice cream you had a scoop. Would you describe that scoop to us, please?

A. You see them in any drugstore, just what they use to dip out ice cream. Then there is a flange on the side where you push it, and there is a little piece of metal that clears the scoop whereas it will go right into the dish.

Q. It makes a ball, doesn't it?

A. That's right.

Q. In other words, it is a piece of metal, hollow metal, half the size of the ball, is that it?

A. Yes.

Q. The metal part of the scoop which makes the ball of ice cream is a ball which, if you cut off the bottom part [fol. 67] and left the ball hollow, that forms the scoop part; is that what you mean?

The Court: Do you want him to testify?

Mr. Sheneman: Not unless he is sworn.

The Court: Do you want to be sworn, counselor?

Mr. Engelman: No, I certainly do not and I appreciate that it is leading but I did not think we were in a vital part of the case, your Honor.

Q. Can you describe this scoop a little better to us, Mr. Ferguson?

The Court: You might do it without gestures. Do you object to it even without gestures?

Mr. Sheneman: I guess it is not too important except that it gets to be a habit.

The Court: That is true.

You heard what your counsel said a scoop was. Is that what it was?

The Witness: No, that is what the scoop was.

The Court: That is what it was, what you said?

The Witness: No, I don't mean the counsel, your Honor.

The Court: But the way he described the scoop was as it was, is that right?

The Witness: The description which he has given you would be better than I would be able to get it.

[fol. 68] The Court: That is what they were afraid of down there. But it was correct, wasn't it?

The Witness: It was correct.

The Court: All right.

By Mr. Engelman:

Q. How far did you get down on that tub of ice cream that you described by means of the scoop?

A. About halfways down.

Q. Why didn't you continue to use the scoop after you got halfway down?

A. The ice cream was like a brickbat and I couldn't use the scoop no more.

Q. And what did you do then?

A. I took a butcher knife, this butcher knife that was there.

Q. Was that part of the ship's equipment?

A. That's right.

Q. And will you describe this knife to us?

A. Well, it was about eighteen inches long and it had a little bend on it going to the point of the knife.

Q. How long would you say the handle of the knife was?

A. About four and a half inches.

Q. And as you held the knife—would you take your right hand and indicate how you held the knife?

A. Like this (indicating).

Q. Where did you put your thumb, on the handle?

A. On the handle.

[fol. 69] Q. And when you held the knife in that fashion, how far was the blade from the bottom part of your hand?

A. About half an inch.

Q. And what did you do with the knife?

A. Kept piercing the ice cream——

The Court: Like this (indicating)?

The Witness: Yes.

The Court: You mean pounding up and down?

The Witness: To loosen it.

The Court: Pounding up and down, wasn't it?

The Witness: That's right.

The Court: I am left-handed anyway, but you did not use your left hand.

The Witness: No.

Q. How far were you able to penetrate this ice cream?

A. Oh, about three-quarters of an inch.

Q. And in penetrating the three-quarters of an inch and applying, as the Judge has described and which you say was the way you were doing it, what did that do to this ice cream?

A. I could get little pieces to make, to use the scoop.

Q. You got little pieces and then after you had the little pieces what did you do then?

A. I took the scoop and made balls of them.

[fol. 70] Q. At the time this accident happened, did you get an order from anybody for designated number of portions of ice cream?

A. Yes. The order I received—I had got the order for twelve, and by using the knife I had already served nine.

Q. Nine up to what point?

A. Up to the point of the accident.

Q. What were you doing with your left hand?

A. Holding the bucket against the ice cream cabinet.

Q. And then you say you applied the knife into the ice cream and what happened?

A. The point of the knife hit a piece of solid ice cream.

Q. What happened then?

A. Then when it done that, the point—my hand, it hit the solid ice cream—it jarred the knife and my hand slipped down on the blade of the knife.

Q. Had you served ice cream on the steamship Brazil on other occasions than this particular knife?

A. On two more occasions.

Q. What did you say, sir?

The Court: Two more.

Q. Were there only two prior occasions when you served ice cream or did you serve ice cream every night?

[fol. 71] A. Every night I went on watch at eight o'clock till nine o'clock. That was my duties.

Q. This was your third voyage on the ship, was it?

A. That's right.

Q. On any prior occasions had you ever used this knife in making up orders of ice cream?

A. Yes.

Q. When you were not on watch at night, during the noonday meals did other employees serve this ice cream?

A. Yes, the third baker.

Q. And did you ever see any of the other employees use a knife in order to free the ice cream?

A. Yes.

Q. How often?

A. When the ice cream was so hard that they couldn't scoop it.

Q. Mr. Ferguson, you had a superior, a boss, on this ship, did you?

A. Yes, the chief baker.

Q. Then was there another man above him who was your boss?

A. The chef.

Q. Did you receive any orders from either the chief baker or the chef in connection with your work of getting up orders for first class passengers?

A. Yes.

Q. Tell us what the orders were and who gave them to you.

A. His orders were——

Mr. Sheneman: Whose?

A. When the waiters come up to get the orders that they [fol. 72] should get what they ask for and give them good service.

Q. Who gave you those orders?

A. The chef.

Q. Now, other than this butcher knife was there any other tool about the ship that was available to break up into small pieces this ice cream which you say was so hard?

A. No.

Q. Now, Mr. Ferguson, I show you this tool and ask you if you can tell me what that is (handing)?

A. (After examining) It is an ice chipper.

Q. An ice chipper?

A. Yes, an ice chipper.

Q. Back in the year 1950, before you had your accident, had you ever used such a tool on any steamship, passenger ship?

A. Yes.

Q. How long before 1950 had you used such a tool on a passenger ship?

A. About two years prior to that.

Q. And you say it is an ice chipper?

A. That's right.

Q. So that its primary purpose, I take it, is to chip ice?

A. That's right.

The Court: You use it for highballs.

Mr. Engelman: It is very good for that but I don't drink it, though.

The Court: You don't?

Mr. Engelman: I drink the highballs but not the [fol. 73] chipper.

The Court: They even have different ones now, too. I understand you can freeze ice now so that you don't have to hit the cube and break the cube up.

Mr. Engelman: Yes, it automatically comes out. Things are getting very easy.

Q. Mr. Ferguson, this tool that you have referred to as an ice chipper, before you had this accident, on other vessels had you used it?

The Court: He so stated, two years ago, two years before.

Mr. Engelman: He said it was in use but he did not say it was used on ice cream.

The Court: Oh, I don't know about ice cream. All right.

Q. Had you used it on ice cream?

A. Yes.

Q. Had you seen it used on hard ice cream?

A. Yes.

Q. Had you seen it used on hard ice cream?

A. Yes.

Q. How do you use it?

A. Just jabbing around in there and force the air in the ice cream.

Q. A tool such as that—was a tool such as that adequate to break up into pieces this ice cream on which you were working at the time of the accident?

A. Yes.

[fol. 74] Mr. Sheneman: Objection, your Honor.

The Court: I will take it.

Mr. Engelman: I will offer this tool in evidence, if the Court please.

(Marked Plaintiff's Exhibit 5.)

The Court: At this time we will take a short recess.

(Short recess.)

By Mr. Engelman:

Q. Mr. Ferguson, where was the ice cream kept before it was brought up to the dispensing cabinet chest where you had your accident which you have identified in these photographs? Where was it kept?

A. It was kept down in D deck.

Q. Did you have anything to do with the storage or the temperature of the ice cream down there?

A. No.

Q. Did you have anything to do with bringing the ice cream up from the place on D deck up to the dispensing place?

A. No.

Q. Did you give any order or determine when the ice cream was to be brought up from downstairs to the dispensing chest?

A. No.

Q. Was ice cream served during the noonday meal as well as at night?

A. Yes.

[fol. 75] Q. Did you serve ice cream at the noonday meal?

A. No.

Q. The ice cream was left over from the noonday meal or the night meal—what was done with that, Mr. Ferguson?

A. That was taken back down in the deep freeze.

Q. And the ice cream that was left over at night, when was that taken back down to the deep freeze?

A. The next morning.

Q. And the ice cream that was left over from the noonday meals, when was that taken down?

A. After the noonday meal.

Q. This ice chest or dispensing chest that you told us you were serving the ice cream from, where was the refrigerating equipment, the motor and so forth, used to make it cold, where was that located at the time you had the accident?

A. Underneath, at the bottom of the cabinet.

Q. Looking at this photograph, Plaintiff's Exhibit 3-F, could you indicate, or does that picture show the place where it was at that time?

A. Yes, this empty space here (indicating).

Q. Suppose you put a large S on that for me, would you, please? Will you indicate the space?

A. Here (indicating).

[fol. 76] Mr. Engelman: I am afraid that a ball point pen does not work on that.

The Court: I don't think it is necessary because it has already been indicated.

Mr. Engelman: Yes, he has indicated it.

Q. Now, was that refrigeration equipment that you have just indicated on that photograph, Plaintiff's Exhibit 3-F—was that in working order and condition during this voyage on which you had your accident?

A. As soon as they get into tropical waters, they always have trouble with it.

The Court: Strike that out.

Q. We are only interested in what you know about it.

The Court: Where were you when this took place?
The Witness: Two days out of Rio de Janeiro.
The Court: Coming back?
The Witness: That's right.
The Court: How long is the journey?
The Witness: Forty-two days in all.
The Court: Where were you going from Rio de Janeiro?
The Witness: We were coming back to New York.
The Court: Were you in tropical waters?
The Witness: Yes.
The Court: What is the comparable land that was nearest [fol. 77] you?
The Witness: Brazil.
The Court: Is that nearest to it?
The Witness: Yes.
The Court: How many miles out of Brazil were you?
The Witness: About 800 miles.
The Court: 800?
The Witness: That's right.

Q. North of Brazil?
A. North.
Q. What was the next port that you touched after the accident?
A. Trinidad.
Q. Do you know of your own knowledge whether this equipment, this dispensing chest, was working and refrigerating on the day you had your accident?
A. I don't recall.
Q. Do you recall whether there was any ice in this cabinet around the sides?
A. I do not.

Q. There may or may not have been?
A. There may or there may not have been.

The Court: I want to ask you a question: On this day, when was this ice cream put in this box?
The Witness: The third brought it up after the noonday lunch.
The Court: After the noonday lunch?
[fol. 78] The Witness: Yes.
The Court: How long after?
The Witness: Before he went off watch, about one o'clock.
The Court: Was some of it used for the noonday lunch?
The Witness: No, it wasn't used for the noonday lunch. Every meal had a different assortment of ice cream.
The Court: What time was the noonday lunch?
The Witness: I don't recall.
The Court: At any rate, it was about one o'clock, is that so?
The Witness: Yes.
The Court: It was there then from one o'clock until you started to use it, is that right?
The Witness: That's right.
The Court: About eight o'clock?
The Witness: That's right.

By Mr. Engelman:

Q. Mr. Ferguson, did you see this third bring any ice cream up after the noonday meal, after the accident, did you see him with your own eyes bring it up?
A. No, I was off watch then.
Q. Then why did you tell the Court that it was brought [fols. 79-102] up some time after the noonday meal?
A. Because that was the third's duties.
Q. It was his job to bring it up at that time?
A. That's right.
Q. But did you actually see him bring it up?
A. No, I was off watch.
Q. When did you go back on watch?
A. At eight o'clock at night.
Q. And from the time you went off watch until you went back on watch did you see anybody bring up any ice cream?

A. No.

Q. Do you know of your own knowledge when this ice cream on which you were working was brought up to this dispensing cabinet?

A. I don't know.

The Court: You left him with his fingers cut.

Mr. Engelman: Yes.

Q. Now, following this accident, Mr. Ferguson, what did you do?

A. I went to the dispensary right away.

Q. You had the knife in your hand. What did you do with the knife?

A. I threw it, the knife, to one side.

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[fol. 103] Q. Mr. Ferguson, was ice cream served on the noonday meal on the Brazil to the passengers?

A. That's right.

Q. Did you have anything to do with that service?

[fol. 104] A. Only once a day I served ice cream and that was at night.

The Court: I think that you went into that, counselor.

Mr. Engelman: Well, I just wanted to be sure. Thank you.

Q. Was there a different flavor or kind of ice cream served at the noonday meal from what was served at the evening meal?

A. Always.

Q. And any tubs or parts of tubs of ice cream that were left over after the noonday meal, what was done with them?

A. That was taken back down in that deep freeze.

Q. Now, you said you served the ice cream at night. Were you the last man to serve it?

A. Yes.

Q. And any part of the tub or tubs of ice cream that may have been left, what was done with them?

A. That was left to the following morning.

Q. Where was it left?

A. In the ice cream cabinet.

Q. Up in the bake shop?

A. That's right.

Q. During this voyage—you had this accident on March 27th and you joined this vessel on February 23rd, is that right, sir?

A. That's right.

Q. Between February 23rd and March 27th, were there [fol. 105] any occasions following the evening meal when any ice cream was left over up in the bake shop?

A. Yes, various times.

Q. Parts of tubs or full tubs, or both?

A. Parts of tubs and full tubs and half tubs.

Q. Now, you told the jury yesterday about this refrigerating equipment in the bake shop and its functions particularly when the vessel was in the tropics.

Could you tell us what the condition of the ice cream that was left in the refrigerating cabinet or dispensing cabinet up in the bake shop—what the condition of that was the following morning as you observed it?

A. Just like soup.

Cross-examination.

By Mr. Sheneman:

Q. When you say the following morning do you mean the morning after your accident?

The Court: Just a second.

(Short pause.)

The Court: All right, go right along.

Q. Did you hear my question, Mr. Ferguson?

A. Yes, sir.

Q. Do you mean the morning after your accident this ice cream was just like soup?

A. I didn't see the ice cream the following morning; I was excused from duty.

[fol. 106] Q. That was my understanding. When you say that you saw ice cream just like soup the following morning, what do you mean by that?

A. I mean on various occasions prior to this accident.

Q. But you weren't on duty in the mornings, were you, Mr. Ferguson?

A. Yes.

Q. You were?

A. Yes.

Q. I am going to ask you certain questions which come to my mind as a result of your direct examination yesterday, Mr. Ferguson.

First, I want to ask you whether or not you recall coming to our office in November of 1950, which was a couple of months after you got out of the hospital, and at which time you were asked certain questions and you gave certain answers?

A. That's right.

The Court: That was when you took his deposition, is that it?

Mr. Sheneman: Yes.

The Court: And his lawyer was there with him?

Mr. Sheneman: And his lawyer was there with him, yes, your Honor.

The Court: All right.

Q. That was a couple of months after you got out of the [fol. 107] hospital in 1950, and I would assume, Mr. Ferguson, that your memory of the events was much clearer at that time than it is approximately five years later; wouldn't you say that?

A. That's right.

Q. And the answers that you gave us at that time were truthful; that is correct, is it not?

A. That's right.

Q. And so you tell us now that you were on duty in the morning?

A. I started to work at eight o'clock in the morning.

Q. And until what hour did you work?

A. I had a split watch; my watch was nine hours in a radius of thirteen hours.

Q. Nine hours in a radius of thirty hours? Nine hours over a 30-hour period?

A. Over a 13-hour period.

Q. 13-hour period?

A. Yes, 13-hour period.

Q. You went on watch at eight o'clock. When did you get off watch?

A. I went off watch at twelve o'clock.

Q. And when did you come back on watch?

A. As near as I recall, that was two in the afternoon.

Q. And when did you go off watch?

A. At five o'clock in the evening.

[fol. 108] Q. And when did you come back on?

A. Eight o'clock.

Q. And you remained on until when?

A. Until nine o'clock.

Q. What were your duties when you came on at eight o'clock in the morning?

A. To prepare the desserts for the noontime lunch and the dinner in the evening.

Q. Now, you never served ice cream at any time except at eight o'clock in the evening, is that correct?

A. Only when I was asked to do it.

Q. Well, perhaps I am wrong but I understood you to say on direct examination that the only time you ever served ice cream was at eight o'clock at night. I am wrong about that, am I?

A. When I was asked at any time I had to serve it.

Q. Was it your duty to take the ice cream down at eight o'clock in the morning to the refrigerator on the deck below?

A. No, sir.

Q. What was the occasion or what prompted you to look at this ice cream at eight o'clock in the morning?

A. Well, where the ice cream cabinet was I had to make puddings. They had steam kettles there, that is, where I was to make the puddings for the noonday meal and at supper, and on various times I had to look in the icebox [fol. 109] and the ice cream cabinets.

Q. You are an American citizen now?

A. Yes, sir.

Q. When did you tell us you became an American citizen?

A. On August 8, 1945.

Q. Now, you said yesterday that you had gone to sea beginning in 1910?

A. That's right.

Q. You did not mean to convey to the jury that you had gone to sea continuously since 1910, did you?

A. No, sir.

Q. The fact of the matter is that you did not go to sea from 1914 until about 1946?

A. 1945.

Q. 1945?

A. That's right.

Q. Did you join a union at that time?

A. I did.

Q. The fact of the matter is that there were a lot of jobs right after the war, isn't that true?

A. That is the reason I went back to sea.

Q. The situation is a little bit different today?

A. It is.

Q. Yesterday I think his Honor asked you what time this ice cream that you were serving at the time you suffered your accident was brought up, and I think you told his Honor about one o'clock, and that you saw the third baker bring it up, and then Mr. Engelman examined you, and you [fol. 110] said, if I remember correctly, that you assumed it was brought up by the third baker but you didn't see him, but it was his duty to do so.

Now, I am wondering which version of that is correct.

Mr. Engelman: If your Honor please——

Q. Did you——

The Court: Wait a minute.

Mr. Engelman: I only object to one part of the question in that it ascribes to the witness the direct statement or testimony that he saw the third bring up the ice cream.

The Court: That is right. He did not say, "I saw him." What he said was, or what I said was, "What time was the ice cream brought up?"

He said, "It was brought up at one o'clock by the third."

He did not use the words, "I saw the third bring it up."

Start over again because it was a very long question anyway, and it was rather involved.

Mr. Sheneman: I will withdraw the question.

The Court: Break it up.

Q. Did you see the ice cream come up on this particular day?

A. No, because——

[fol. 111] Q. You did not?

A. It wasn't my duty.

Q. I didn't say it was your duty.

The Court: He did not ask you that.

Q. I said, did you see it brought up?

A. The third brought it up.

Q. How do you know?

A. I didn't see it.

Q. How do you know he brought it up?

A. That was his duty.

Q. Well, but you didn't see him; you are quite sure about that?

A. I didn't see him.

Q. All right.

A. Because I was off watch.

Mr. Sheneman: I should like to read from the testimony——

Mr. Engelman: Wait until I get my copy. And will you please indicate the part of the page?

Mr. Sheneman: At the very beginning, at the top of page 55, Mr. Engelman.

Q. I should like to read some questions which you were asked and I ask you whether or not you gave these particular answers:

"By Mr. Reid"—and he is now speaking about the man bringing up ice cream:

"Q. Did you see him?

"A. I see him bring the ice cream up but I didn't see how much he brought up because it was none of my [fol. 112] affair.

"Q. You saw him bringing some up; I will put it that way?

"A. That's right.

"Q. What time was that; what time of the day?

"A. About half past one, two o'clock.

"Mr. Engelman: Is this the day of the accident?

"Mr. Reid: We are talking about the day of the accident now.

"Mr. Engelman: You see, if we don't give him specific questions, we don't get specific answers.

"By Mr. Reid:

"Q. On the day of your accident, did you see him?

"A. Yes.

"Mr. Engelman: Did you see him bring up ice cream that day, that specific day?

"The Witness: Did I see him bring it up?

"Mr. Engelman: On that specific day you had your accident.

"The Witness: Yes."

The Court: Were you asked those questions and did you make those answers?

The Witness: Yes, sir.

The Court: Was it true?

The Witness: It was true.

[fol. 113] The Court: All right.

Q. Did you examine this ice cream immediately after you had your accident?

A. No, sir.

Q. Did you notice any hard lumps in the center or in any portion of the container?

A. It was like a cone shape in the center.

Q. When did you see that particular portion of hard ice cream?

A. When I got down halfways down the tub.

Q. That was the time you saw it?

A. That's right.

Q. How do you know that it was that portion of the ice cream that the end of the knife blade hit just prior to your having your accident?

A. Because I——

Mr. Engelman: I object to the question. I have to object to that question on the ground that there is no testimony that that was the portion which the blad- hit.

The Court: I thought that there was. I thought that was the whole tenor of his testimony.

Mr. Engelman: As I understand, the tenor of his testimony was that—

The Court: He struck a hard piece down there.

Mr. Engelman: But he is referring—counsel is referring, as I understand it, to the cone shape center of the ice [fol. 114] cream.

The Court: No, the witness so stated. I will overrule your objection.

Mr. Sheneman: Would you read the question, please?

(Question read.)

A. It wasn't that portion of the ice cream because I was working from that point to the side of the container so as I could make small pieces of ice cream.

Q. So it wasn't the hard center cone of the ice cream that the end of the knife blade struck just as you had your accident?

A. It was about four inches from the edge of the knife, where I pierced a piece of hard ice cream, and when the knife jabbed into it, my hand slipped on the blade.

Q. Now, how do you know that your hand slipped just as you hit this hard center portion? Isn't it very probable that you hadn't grabbed the knife tightly with your hand or that you did not have your thumb over the top or that you had it at an angle? Isn't that quite possible?

Mr. Engelman: How many questions do we have?

The Court: I don't know. There are quite a number in there.

Q. Isn't it possible that you hadn't gripped this knife [fol. 115] tightly?

A. At the time that I pierced it into the ice cream, prior to that I had been using the knife and made little pieces of ice cream and served nine balls.

The Court: He did not ask you that and I think I am going to strike your answer out.

Q. Isn't it possible that you did not have the knife tightly in your hand and that is why this happened?

A. No.

Q. Then what was the reason why this happened?

A. As soon as the point of the knife hit the hard piece of

ice cream the jar of it forced my hand down on the blade.

Q. How do you know that it hit a hard portion of ice cream?

A. There was nothing else in there but ice cream.

Q. Nothing else but hard ice cream? I thought you told me that there was just a cone in the center?

Mr. Engelman: I will have to object to this. Counsel has the habit, if the Court please, of asking a question, and then when the witness is about to answer he puts in another question that is a little argumentative in the question, and I ask that he be asked one question at a time and give the witness sufficient time to answer it.

[fol. 116] The Court: Yes, that is the way to do it.

Q. Was the ice cream of the same degree of hardness?

A. No, it was more harder in the center than it was at the side.

Q. All right. How do you know that the knife hit the hard cone in the center?

Mr. Engelman: I will have to object to that.

The Court: Objection overruled.

Mr. Sheneman: Would you read the question?

(Question repeated.)

A. I was working from the center to the sides.

The Court: Did it hit the hard cone?

The Witness: It did not hit the hard cone in the center.

The Court: All right.

Q. Now, you suggested yesterday, Mr. Ferguson, that there were others in digging out ice cream who also used a knife, is that correct?

A. At various times.

Q. Who were they?

A. The third.

Q. The third?

A. Yes.

Q. What was his name?

A. Joe Rivas.

Q. When did you see him use a knife, do you remember?

A. On various occasions.

Q. There was only one person serving ice cream at night and that was you, is that right?

[fol. 117] A. I relieved Rivas at night.

Q. And on what watch did Rivas serve ice cream?

A. At noontime and up till eight o'clock when I went on watch.

Q. And what were your duties from one to five?

A. I used to prepare desserts such as cookies, cake, rolls and puddings.

Q. Where was Rivas serving ice cream in relation to the point where you were serving these cookies and puddings?

A. I wasn't serving food; I was making them.

Q. Where was he serving out ice cream in relation to where you were doing your duties?

A. At the ice cream cabinet.

Q. What is the distance between that point and where you were working?

A. Oh, about——

Q. Is there a partition? I am sorry; how far away?

A. About five feet.

Q. Is there a partition there?

A. There is.

Q. And you could see him serving ice cream behind this partition?

A. I couldn't see him but I know it was his duty.

Q. But you couldn't see him serve?

A. I couldn't see him because the ovens were the dividing point.

Q. Have you ever seen a knife used to serve ice cream [fol. 118] on any other vessel?

A. Yes.

The Court: I did not hear that question.

Q. Have you ever seen a knife used to serve ice cream while employed on any other vessel; have you?

A. Yes.

Q. A knife similar to the one that you used on this particular occasion?

A. No.

Q. What kind of a knife was it that you saw used?

A. A French knife.

Q. What is a French knife?

A. A French knife has a flange at the bottom of the handle where your hand would never go down on the blade.

Q. Then would you say that the knife that you used on this particular occasion was improper?

A. That's right.

Q. What was the purpose of this knife?

A. They used it for to cut French bread.

Q. It wasn't put there to serve ice cream, was it?

A. No.

Q. It was in the bake shop for the use of the baker in cutting the French bread, is that right?

A. That's right.

Q. Why wasn't the ice cream which remained after the evening meal taken down to the C deck immediately?

The Court: D deck.

[fols. 119-124] Q. D deck—why wasn't it taken down immediately?

A. My duties finished at nine o'clock and I had nothing to do with taking it down on D deck.

Q. Do you know why it wasn't taken below?

A. I do not.

Q. Was it simply because you were off duty that you didn't take the time to put it down on D deck?

A. That's right; we weren't supposed to.

* * * * * * *

[fol. 125] Q. From whom did you take your orders?

A. I took them from the chief baker and the chefs.

Q. Who was that?

A. The chief baker's name was Vozzi.

[fol. 126] Q. Were you responsible for the work of anyone else?

A. No, I was only responsible for the work I was supposed to do.

Q. Did you give orders to anybody else?

A. No one.

Q. What were the temperatures, Mr. Ferguson, in these two boxes up on C deck in the bake shop; do you know?

A. I couldn't tell you that because it wasn't my duty to look at the temperatures.

Q. Do you know whether or not they were the same or different?

A. They varied.

Q. The temperature in those two boxes varied?

A. They varied, yes.

Q. In other words, I want to understand you——

A. I don't quite understand you.

Q. There were two boxes up on C deck, isn't that correct?

A. You mean ice cream cabinets?

Q. Right.

A. The ice cream cabinets—there was only one temperature for the two cabinets.

Q. Do you know the temperature down below?

A. I do not.

Q. Do you know the temperature?

A. No.

Q. So you don't know the temperature down below on the date of your accident?

A. I do not.

Q. And you don't know the temperature in the ice cream [fol. 127] chest on C deck on the day of your accident?

A. The ice cream cabinet wasn't working properly.

Q. How do you know that?

A. Because I seen the reefer engineer tinkering around it.

Q. I refer to your testimony on direct examination yesterday, Mr. Ferguson and, as I recall, Mr. Engelman asked you whether or not you knew whether these were operating properly on the day of your accident, and you told him you didn't know. Isn't that correct?

Mr. Engelman: Now, if your Honor please, I am going to object to this question because the witness's immediate prior testimony to which counsel is referring was not referring or did not, as I understand it, refer to the specific date of the accident. He referred——

The Court: I don't remember what it was but you let him state whether he said it or nof.

The Witness: Would you mind repeating the question?

(Question read.)

A. That's right, I seen the reefer engineer tinkering around the machine.

Q. On that particular day?

A. Yes, every day he was there.

The Court, No, he didn't ask you about every day.

[fol. 128] Q. He was there every day?

A. That was his duty.

Q. What were his duties?

A. To inspect all the refrigeration machinery.

Q. And you saw him every day inspecting the machines?

A. That's right.

Q. But you didn't see him every day repairing?

A. No.

Q. On the day of your accident did you see him inspect the machines?

A. Yes, every morning.

The Court: Not every morning; that day.

The Witness: Yes.

The Court: That night?

The Witness: No, because he was off watch at that time. He was relieved. He worked from four to eight. There were three different watches. Then the second come on after he went off.

Q. Now, what time of the morning did you see the reefer engineer inspecting the refrigeration equipment on the moring of your accident?

Mr. Engelman: If the Court please, counsel is using the word "inspect"——

The Court: That is exactly what the witness said.

Mr. Sheneman: He said, "Every day he inspected it," [fol. 129] Mr. Engelman.

Mr. Engelman: I just wanted to know when you mean.

Q. I want you to tell me when you saw him on this particular morning?

A. Just a little after I went on watch he used to go and have his breakfast at that time.

Q. What time did he go on that watch?

A. I went on watch at eight o'clock in the morning.

Q. I thought you told me that the reefer went off watch at eight o'clock.

A. He ate his breakfast after he done his watch.

Q. I am not inquiring about when he ate his breakfast. Didn't he go off watch at eight o'clock?

A. That's right.

Q. How did you see him inspect the equipment after eight o'clock if he went off watch at eight o'clock?

A. He was there at eight o'clock.

Q. Then he inspected it at eight o'clock and he was inspecting it when you got down there?

A. He inspected it every day. He was there when I was there, when I went on watch.

Q. On this particular day?

A. I don't say that particular day.

[fol. 130] Q. Well, that is what we have been talking about the last five minutes, Mr. Ferguson. Did you see the refrigeration engineer inspect this apparatus on the day of your accident?

A. Yes.

Q. What time?

A. When he came back on at night, at eight o'clock, he came back on the same time as me, rather, at four o'clock in the afternoon. He worked fours hours and then he was eight hours off.

Q. So you did not see him inspect it at breakfast time? I am confused now, Mr. Ferguson.

You did not see him inspect it at breakfast time?

A. I seen him looking at the machine, inspecting it.

Q. At breakfast time?

A. At breakfast time.

Q. Did you see him inspecting it again at night?

A. That's right.

Q. What time?

A. In his afternoon watch.

Q. What time?

A. His watch was from four to eight.

Q. What time did you see him inspect this?

A. At eight o'clock at night.

Q. Just as he was going off watch?

A. That's right.

Q. Did you discuss it with him, the refrigeration?

A. I didn't, because it was-'t none of my business.

[fol. 131] Q. Did you hear him make any remarks about it?

A. I heard him say something to the chief but he didn't say nothing to me; I had nothing to do with it.

Q. You told us that the ice cream boxes do not operate properly from time to time or did not operate properly from time to time.

A. That's right.

Q. Was there ever an occasion when the ice cream in the box became harder rather than softer when the ice cream chest was not operating properly?

A. No. The heat of the box didn't cause the ice cream to get hard, it caused it to get soft, and it had to be taken back down in the deep freeze.

Q. Now, how do you account for the fact that whenever you got into the tropics this refrigeration equipment didn't operate right?

A. I couldn't tell you that. I am a baker, I am not an electrician.

Q. Did you ever have any conversation with anybody on this particular day about the hardness of this ice cream?

A. I don't recall.

Q. You don't remember?

A. I don't recall.

Q. Were there spoons available for dipping out ice cream?

A. There were spoons but they weren't good for dipping out ice cream.

Q. Why do you say that they were not good for dipping [fol. 132] out ice cream?

A. Because if you put a spoon in, as soon as it hit the ice cream it would only slide.

Q. Have you ever seen a spoon similar to this one before (indicating)?

A. Yes, sir.

Q. Did they have them on board?

A. They had.

Q. The Brazil?

A. They had.

Q. Did they have them in the bake shop?

A. They had them in the bake shop, yes.

Q. Did you ever use them to dish out ice cream?

A. No.

Q. And do you tell this Court that if you used this spoon it would slip off?

A. That's right.

Q. What do you mean by that?

A. Give me the spoon.

(Spoon is handed to the witness.)

A. With this point, that couldn't pierce the ice cream; it would only slide off.

Q. When ice cream is hard and you have difficulty in removing it from a container, isn't the proper way to get it out of the tub to take your dipper, put it under a hot water faucet and then dip it into the ice cream?

A. If you done that——

Q. Answer my question yes or no. Is it or is it not proper?

A. It isn't proper.

Q. Why not?

[fol. 133] A. Because if you put a dipper in hot water and then take it out and put the dipper to the ice cream, immediately it gets to that temperature and it's worthless.

The Court: What is worthless?

The Witness: You can't use the scoop.

The Court: What is worthless?

The Witness: The effort is worthless.

Mr. Sheneman: I am sorry, your Honor, I did not get that.

The Court: He said that the effort is worthless.

The Witness: The effort—when you take the scoop and you put it to the ice cream your effort would be wasted.

The Court: Maybe that is clearer.

Mr. Sheneman: Well, I am afraid that it is not.

Q. You will have to explain that to me. Do you mean that it won't go into the ice cream?

A. That's right, because you are taking it from heat to frigid.

Q. Have you ever seen a dipper put under a hot water faucet?

A. I have tried it. That was the reason I used the knife, because I knew it was impossible.

Q. Have you ever seen anybody else do it?

A. No.

[fol. 134] Q. Never?

A. No.

Q. Who suggested it to you for the first time then if you had never seen anybody else do it?

A. Because I have seen people have it in cold water, not hot water, keep the different cold water.

Q. And if you keep the different cold water and then dip it into this hard ice cream, can you get the ice cream out?

A. No.

Q. Then what is the point of keeping it in cold water?

A. To keep the dipper clean. There's a little piece of metal in the dipper cup and that has to be clean. That's a little thing on the side of the dipper when you press it and this piece of metal in there clears the ice cream and makes the ball.

Mr. Sheneman: If your Honor please, I am going to have to refer to the examination before trial. May I have a 5-minute recess to check that?

The Court: All right. Do you want to look through your papers?

Mr. Sheneman: Yes.

The Court: The jury may retire for a few minutes.

(Short recess.)

By Mr. Sheneman:

Q. Mr. Ferguson, had you ever seen ice cream at any [fol. 135] time on any day previous to your accident as hard as the ice cream that you were serving at the time of your accident?

A. Yes.

Q. And what did you use on those prior occasions to get the ice cream out of the tub?

A. The same knife that I was using then, the night of the accident.

Q. The same knife? You had used it on several occasions prior?

A. On various times before.
Q. Who else used the knife to remove the ice cream?
A. The third.
Q. The third baker?
A. That's right.
Q. Isn't it a fact that the only time that you ever saw the third baker use this knife was to cut bread?
A. No, I seen him using it to cut ice cream.
Q. I should like to read from the testimony which you gave at our office a couple of months after the accident——

Mr. Engelman: I don't think that it was a couple of months after the accident.
Mr. Sheneman: A couple of months after he got out of the hospital, I am sorry.
Mr. Engelman: What is the date of this?
Mr. Sheneman: November.
The Court: 1950?
Mr. Sheneman: November 17, 1950.
[fol. 136] Mr. Engelman: What page, please?
Mr. Sheneman: Page 70, eight lines from the bottom.

Q. "Q. Did you see anybody use that knife at any time before you had your accident?
"A. I did.
"Q. Who used it?
"A. The third baker.
"Q. Did you ever use it before?
"A. I did not."
A. I must have made a mistake. I must have misunderstood the question because I had used it various times before.
Q. So that answer is wrong?
A. That answer is wrong, at that time.
Q. What do you mean, "at that time"?
A. Because I couldn't understand his question clearly.

The Court: Read the question to him again.

Q. "Q. Did you ever use it before?"

The Court: What didn't you understand about that?
The Witness: Him saying, "Did you ever use it before?"
The Court: What was puzzling about that?

The Witness: Did I ever use the knife before.

[fol. 137] Mr. Engelman: I think, if the Court please——

The Court: Now, please, we don't need anything, counselor. I will send the jury out if you want to make a comment.

Mr. Engelman: I wasn't going to comment—I would not comment—I was merely going to say this, that if counsel stops at this one particular point——

The Court: He may go along further or you may go along.

Mr. Sheneman: I intend to go along.

Q. You did not understand that question?

A. No.

Q. You did not have any trouble with it this morning when I asked you, did you?

A. No.

Q. But you didn't understand it at that particular time?

A. At that particular day, I didn't.

Q. You didn't?

A. No.

Q. All right. I will continue:

"Q. Did you see anybody else use that knife before?

"A. The third baker.

"Q. Anybody else beside him?

"A. No. He used that to cut bread.

"Q. It is a bread knife, is it not?

"A. No, it is a butcher knife.

"Q. It was used to cut bread?

"A. He used it to cut bread. It was like a razor."

[fol. 138] You never suggested at the time you were examined in our office in 1950 that the third baker ever used that knife for any other purpose than to cut bread, did you?

A. I never made a statement to that effect there at that time but I made a statement to the effect the same day that he had used it for to cut ice cream.

Q. You made a statement the same day of your accident that the third baker had used the knife to cut ice cream?

A. At various times I said that.

Q. You said that?

A. Yes.

Q. And to whom did you say that?

A. I said it to Reid who was examining me.

Q. Let me understand that. At the time you were examined in our office you told Mr. Reid that the third baker had used the knife on numerous or several occasions in order to loosen this ice cream?

A. That's right.

Mr. Sheneman: Will you concede, Mr. Engelman, that there is no such testimony?

Mr. Engelman: No, I will concede nothing.

The Court: Then you will have to read the whole thing. You know whether it is in there or not.

Mr. Engelman: I would have to read it all.

The Court: All right, then we will read it.

[fol. 139] Mr. Sheneman: Your Honor, I hate to take this Court's and this jury's time to read 100 pages of deposition. I think that we can save a lot of time if Mr. Engelman will take the trouble to read it over during the noon recess.

Mr. Engelman: I will do that.

The Court: Very good.

By Mr. Sheneman:

Q. The third baker had already been serving ice cream on the evening of your accident?

A. Yes, that is right.

Q. Did he tell you that he had any trouble with serving it?

A. No, because when I went on watch——

The Court: No. You have answered the question.

Q. The ice cream that you were using at the time was the ice cream which had been brought up about one o'clock or two o'clock, is that right?

A. That's right.

Q. You did not make any request to anyone to bring up some additional ice cream after you came up on watch?

A. I had no authority to request anyone to bring it up.

Q. Quite apart from your authority, you did not need any, did you?

[fol. 140] A. There was a tub and a quarter there when I went on watch.

Q. Did you go on watch that night at seven o'clock or at eight o'clock?

A. I don't recall. My duties was to relieve him at eight o'clock to serve ice cream.

Q. Would it refresh your memory if I suggested to you that you really went on watch at seven o'clock at night but didn't start serving ice cream until eight o'clock. Does that ring a bell?

A. That may be the case.

Q. What were you doing from seven to eight?

A. Preparing other foodstuff for the next day.

Q. Such as?

A. Such as baking applies or making cookies or cake.

Q. You were doing that from seven to eight that night?

A. That's right.

Mr. Engelman: Just a minute now. I am going to object to that and move to strike it out. Counsel is suggesting something to the witness that he is not certain about. Counsel either knows that to be a fact or not.

Is that the fact?

Mr. Sheneman: I do not know what he was doing. I was not there, Mr. Engelman. This man has got a very good memory about a lot of things——

[fols. 141-144] The Court: Well, I think it is proper cross-examination.

Q. I think you told us that this accident occurred about twenty minutes to nine?

A. That's right.

Q. The ice cream had been served for an hour and forty minutes prior to the accident?

A. That's right.

Q. And you served ice cream for forty minutes?

A. For forty minutes.

Q. And when you started serving ice cream what did you use as an implement?

A. The scoop. There was a tub and a quarter of ice cream when I went to work.

Q. All right.

A. And I used the scoop to finish the quarter tub and then when I started the fresh tub was hard on top but with a little force I could use the scoop.

Q. You had no complaints about the scoop?

A. No.

Q. It was mechanically perfect, wasn't it? It was all right and it was in good working order?

A. The scoop was all right.

. . . . . .

[fol. 145] Q. Now, you used this knife, Mr. Ferguson, simply because you were in a hurry, you did not want to take the time to use the dipper or the spoon, isn't that correct?

A. No, that's incorrect.

Q. I would like to read the testimony which you gave—were you in a hurry, incidentally?

A. No, I wasn't in a hurry. When I went—the chief [fol. 146] gave me the instructions when I went on that these were first class passengers and they should get whatever they asked for and give them good service, and that's what I was trying to do, when a first class waiter would come to give me the order, that's what I would do.

Q. I should like to read from your testimony—page 96, Mr. Engelman, the first question on the page, about a quarter of the way down:

"Q. Now just a couple of more questions, Mr. Ferguson, to get back to the accident. When you found that this ice cream was hard, did you know that this knife to which you refer was right there nearby?

"A. That is where they always kept it.

"Q. And you just reached down and got the knife?

"A. Because I was in a hurry, yes."

Did you give those answers?

A. I may have given it like that but it wasn't—but that isn't clear; I wasn't in a hurry for my own self; I was trying to get the orders.

Mr. Sheneman: I think that is all.

Mr. Engelman: I just have a few questions that I would like to clarify here, if the Court please.

I would like the record to show that this examination before trial of Mr. Ferguson consisted of 98 pages of [fol. 147] testimony.

Is that correct, sir?
Mr. Sheneman: Yes.

Redirect examination.

By Mr. Engelman:

Q. Now, Mr. Ferguson——

The Court: You were there, were you not?
Mr. Engelman: Yes, I was at the deposition.
Mr. Sheneman: And I think it is obvious from the testimony which I read this morning that Mr. Engelman asked questions.
The Court: And took part in it?
Mr. Sheneman: That is right.
Mr. Engelman: That is conceded for the record.

Q. There has been some mention here, when you got to the bottom half of this tub of ice cream, about a cone or a cone shape in the tub.
In what part of the tub was the cone?
A. In the center.
Q. Now, all of this ice cream—we are speaking now about the bottom half that you were working on and on which you were using the knife, was it of equal hardness from the sides, that is, from the edge of the tub, was it of equal hardness from the sides right through to the center?
A. No, sir.
Q. Was one part of it harder than the other?
[fol. 148] A. That's right.
Q. What part of it was harder?
A. I would say nearer to the cone shape. I was working from the center of the ice cream cabinet on the tub to the edge and making little pieces.
Q. Why were you working—when you say you were working from the center, do you mean that you were working from the cone?
A. I was, yes. I was feeling my way with the knife to loosen up the ice cream.
Q. From the center of the cone in what direction?
A. Towards the side of the container.
Q. Why were you doing it that way?

A. Because it appeared to be softer as I was going to the edge.

Q. And is that what you were doing at the time the accident happened?

A. That's right.

Q. Now, on the question of the use of this knife by anyone else on the ship, I think you mentioned the third. What was his name, do you know?

A. Joseph Rivas.

Q. And he had been on watch in the morning?

A. That's right.

Q. And you were not on watch?

A. I went on watch—he went on watch before I went on.

Q. Was he there working during part of the time that you were working there?

[fol. 149] A. Yes, at different times.

Q. Now, counsel for the defendant asked you if at the place you were making some pastries and cookies and puddings and things, whether there was a partition between that point and these ice cream dispensing cabinets, and I think you said yes; is that right?

A. That's right.

Q. Now, in connection with your work did you have occasion to go over to the dispensing cabinet?

A. Yes.

Q. What would bring you over there? Why would you leave the place where you were working behind the partition and go over to the dispensing cabinet?

A. The place where the ice cream cabinets were, that's where the steam kettles were where I used to make the puddings and I had to go from one room to the other room, whatever kind of job I was doing.

Q. And would that bring you alongside these dispensing ice cream cabinets?

A. It was to my left and I couldn't help but pass it.

Q. On some of those occasions did you see Rivas use the knife on ice cream?

A. That's right.

Q. Now, this deep freeze chest downstairs on D deck, who had charge of that so far as taking the ice cream out of there and bringing it back?

A. The chief baker gave the third baker the instructions [fol. 150] what to bring up when the menu was brought in. It was written on the menu what ice cream was to be brought up and then he would tell the third what kind to bring up.

Q. Who had the keys to it?

A. The chief baker.

Q. Did you have the keys to it?

A. I did not.

Q. And did you take your orders from the chief baker with respect to the service of ice cream and the handling of the tub?

A. That's right.

Q. Now, counsel for the defendant had suggested on his cross-examination that when your watch was over at about nine o'clock you didn't take the tub of ice cream back to the deep freeze because you just didn't want to do the work.

A. It wasn't a case of not wanting to do the work; I was off watch.

Q. Did you have the keys to the freezer downstairs to get in?

A. I did not.

Q. Did your boss, the chief baker, ever order you to take this ice cream and bring it back down into the deep freeze overnight?

A. No.

Q. So that you had no way of getting it there?

A. No.

Q. Now, I think you said that about one o'clock or some [fol. 151] time after one the third, a man by the name of Rivas, brought up some ice cream from the freezer on the day you had your accident, is that right?

A. That's right.

Q. How much did he bring up, do you know?

A. I don't know. I just know what was there when I went on watch to serve at night.

Q. Do you know how many tubs or containers he brought up at one or 1:30?

A. I do not.

Q. Do you know whether any ice cream was brought up

between 1:30 and eight o'clock when you started to serve it?

A. No.

Q. Do you know whether the particular tub that you were serving ice cream from—do you identify that particular tub as the tub that Rivas brought there at 1:30?

A. That's right.

Q. Do you understand that question? The particular tub on which you were working when you had your accident.

Mr. Sheneman: If your Honor please, I think the witness has answered the question and I think that it is improper.

The Court: No, read the question to him.

(Question read.)

A. I couldn't identify that.

[fol. 152] Q. Could you identify it as that particular tub?

A. I couldn't identify it, whether he brought it up at the noonday meal. I only know what was there when I went on watch at night.

Q. Did all of these tubs look alike? Was one like another?

A. That's right.

Q. Was there any particular marking on the tub or tubs that he brought up at 1:30 which would identify that particular tub as the one you were working on at the time you had your accident?

A. Only the flavor was marked there, that's all, on the outside of the tub.

Q. Did you notice the flavor that was marked on there at about 1:30 when he brought the ice cream up?

A. I did not.

Q. You don't know what flavor it was?

A. I did not.

Q. Do you know how much ice cream was in the ice cream chest at 1:30 after Rivas brought this ice cream up?

A. I did not.

Q. In the conduct of the ship's business, did they at times during this voyage on which you had your accident bring up ice cream from the deep freeze after 1 or 1:30 in the afternoon?

A. Yes, sir.

Q. Did you see that at times?

[fol. 153] A. No, I didn't see it but I knew they did it.

Q. How do you know they did it, if they did?

A. When the ice cream cabinet was out of commission they left the ice cream down in the deep freeze as long as they could, or put it into a freezer where it would loosen up, in a milk box, I think it was.

Q. When you say a freezer and it would loosen up in a milk box, is this some different appliance than what we have already mentioned in this case?

A. It is a different temperature.

Q. You are not referring to the ice cream chest now, are you?

A. No.

The Court: A place where they kept milk.

Mr. Engelman: I think that is all.

Recross-examination.

By Mr. Sheneman:

Q. Where is this milk box?

A. Down on D deck.

Q. Did you ever take ice cream down there?

A. I never took ice cream down at all.

Q. Did you ever see anybody put it in the milk box?

A. I never did.

Q. So you don't know whether there was ice cream in that milk box at any time during that voyage, do you?

A. I only know this——

Q. Did you see it in there?

A. I didn't see it.

Mr. Sheneman: That is all.

[fol. 154] Mr. Engelman: All right, you may step down, Mr. Ferguson.

(Witness excused.)

The Court: Next witness.

Mr. Sheneman: Your Honor, before the next witness is called, I should like to have this marked Defendant's Exhibit No. 1.

Mr. Engelman: Well, is there any proof in the case as to that? It seems to me to be completely innocuous, but is there any proof so far in the case that it was on the ship?

The Court: Yes.

Mr. Sheneman: Yes, he said that.

Mr. Engelman: He said that there was a similar spoon.

The Court: I will accept it.

(Marked Defendant's Exhibit A.)

Mr. Engelman: Mr. Levowitz, will you take the stand?

* * * * * * *

READING OF EXCERPTS FROM INTERROGATORIES

Mr. Engelman: If the Court please, before I proceed with the testimony of this witness, we filed some inter- [fol. 155] rogatories or questions to which the defendant responded, and there are just a couple of those questions that I would like to read into the record before I adduce this testimony.

I can read it from my copy if you have yours.

The Court: I have the originals here, if you want it.

Mr. Engelman: All right, I will do it from the originals. Thank you.

The Court: These are interrogatories and this is taken under another one of our rules. Either side may submit interrogatories to the other side asking them questions and asking for answers. I suppose that these were questions asked by the plaintiff of the defendant, is that right?

Mr. Engelman: That is right.

The Court: Of course, the party making the answer is bound by the answer.

Mr. Engelman: (Reading) "1. On a voyage of the SS Brazil beginning at the Port of New York on or about February 23, 1950, did the defendant store tubs of ice cream in a freezer or frozen locker aboard said ship?

"A1. Yes.

"2. If the answer to the foregoing interrogatory No. 1 [fol. 156] is in the affirmative, state:

"(a) The precise location of the freezer or frozen locker.

"A2. (a) 'D' deck amidships.

"(b) Its height, width and depth.

"Seven feet, three and one-half inches-height.

"Six feet, three and one-half inches-length.

"Seven feet, three and one-half inches-depth.

"(c) The usual temperature maintained inside said freezer. The temperatures maintained in the freezer for twenty-four hours prior to March 23, 1950, at eight p. m.

"A. The machinery was set to maintain temperatures of not less tha- minus 5 degrees. There is no record as to actual temperature.

"(d) The name and address of the manufacturer of the ice cream stowed in said freezer.

"A. Horton's Ice Cream Company, 9 West 141st Street, New York City, New York.

"(h) Was it the custom and practice aboard the SS Brazil to bring tubs of ice cream for the evening meal from the freezer and place them in an ice cream chest located in the bake shop, some time before the evening meal?

"A. Yes.

[fol. 157] "3. If the answer to the foregoing interrogatory No. 2(h) is in the affirmative, state:

"(a) Was there a custom and practice with respect to the time before the dinner hour the tubs of ice cream were brought from the freezer and placed in the ice cream chest in the bake shop?

"A. Yes.

"4. If the answer to the foregoing interrogatory No. 3 (a) is in the affirmative, state:

"(a) The customary hour for transferring the tubs of ice cream to the ice cream chest.

"A. Between the noon and evening meals if there was then an insufficient amount for the evening service already available.

"(b) The name and rank of the person or persons in charge of removing the tubs of ice cream from the freezer to the ice cream chest for the evening meal on March 23, 1950.

"A. Jose Vozzi, first baker.

"(c) The usual number of tubs of ice cream transferred

to the ice cream chest for the evening meal during the voyage beginning February 23, 1950.

"A. There was no usual number.

"(d) The number of tubs of ice cream the ice cream chest in the bake shop could hold.

[fol. 158] "A. Varying, depending on the type of ice cream.

"(e) The number of tubs of ice cream brought from the freezer to the ice cream chest for the evening meal on March 23, 1950, and the time each tub of ice cream was taken from the freezer and placed in the ice cream chest.

"A. Defendant has no records as to this.

"7. With respect to the ice cream chest located in the bake shop of the SS Brazil on March 23, 1950, state:

"(d) The temperature ranges that could be maintained in said ice cream chest and the temperatures maintained therein on March 23, 1950."

That referred to the ice cream chest up in the bank shop, and the answer was:

"Temperature could be maintained from zero to 5 to 10 degrees above zero. There is no record as to actual temperature."

David Levowitz, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Engelman:

Q. What is your business or occupation, sir?

A. I am a director of the New Jersey Dairy Laboratory at New Brunswick.

The Court: New Jersey Laboratories?

The Witness: The New Jersey Dairy Laboratories at New Brunswick, New Jersey.

Q. How long have you been a director of the New Jersey [fol. 159] Dairy Laboratories?

A. Since June, 1936.

Q. And what is the business and purpose of the New Jersey Dairy Laboratories?

A. Primarily the control of various dairy products.

Q. The word "Laboratories"——

The Court: What do you mean by control?

The Witness: Chemical and bacteriological analyses and the processing and efficiency of various products.

Q. And you are the director of these Laboratories?

A. Yes.

Q. How many people do you have working for you there?

A. At present, twelve.

Q. And prior to 1936, when you became director of this laboratory, were you identified with dairy and dairy products in your work?

A. Yes.

Q. Tell us about that.

A. I occupied the various positions at Rutgers University in conjunction with the dairy department, and since 1931 I have been analyst for the New Jersey State Department of Agriculture for dairy products.

Q. You are a graduate of a college, are you?

A. My Master's and Doctor's degrees are from Rutgers University.

Q. A Master's and Doctor's degree in agriculture or [fol. 160] with any work identified with dairy products?

A. Identified with dairy products as follows: My Master's was in biochemistry, with my special work there in the manufacture of ice cream, with the dairy division, and I have worked there under a National Research Council fellowship under the Parnell Fund.

My Doctor's degree was in physical chemistry with a minor in dairy bacteriology.

Q. Will you tell us briefly your experience with ice cream?

A. Since 1927 I have been occupied to a degree with one or another of the phases of the manufacture or control of ice cream.

Q. In what way, sir?

A. Chemical, bacteriological and general plant processing and efficiency.

Q. Did your work bring you in contact with the storage and handling of ice cream as well as the chemical analysis of ice cream?

A. Yes.

Q. Now, are you familiar or do you have knowledge of

an ice cream that was on the market in the year 1950 known as Horton's ice cream?

A. Yes.

Q. And are you familiar with the properties of that ice cream?

A. Substantially.

Q. Have you worked on that ice cream as well as other brands of ice cream in your laboratories?

[fol. 161] A. Yes.

Q. Now, the questions that I will ask you deal with this particular product which the defendant says it had on its vessel in March of 1950 and on which the plaintiff was working at the time he had this accident. I think you have seen him and heard a small part of his testimony; is that right sir?

A. Yes.

Q. Now, ice cream of that kind, where it is kept or stowed in a deep freeze or chest, is there a recognized temperature in the industry at which it should be stowed in a deep freeze?

A. Yes.

Q. What is that temperature?

A. Preferably below minus 5 degrees Fahrenheit.

The Court: What is that?

The Witness: Temperatures for the hardening of ice cream are generally below minus 5 degrees Fahrenheit.

The Court: That is 5 below zero, is it?

The Witness: Yes. The preferred temperature range is actually minus 10 to minus 20 but minus 5 is suitable.

Q. Why is that the preferred temperature range, minus 10 to minus 20?

[fols. 162-168] A. To keep the ice cream as firm as possible.

Q. And why should the ice cream be kept as firm as possible?

A. Because if the ice cream is not firm it is going to lose air, and as it loses air you lose the characteristic structure of ice cream and it will remelt to what is called ice cream mix.

The Court: You say that 5 degrees is suitable?

The Witness: Minus 5 is suitable but for the best effi-

ciency you use minus 10 to 20. If it is permitted to go above minus 5 it will start to melt down to ice cream mix.

The Court: And then when you freeze it again is that when it becomes ice cream mix?

The Witness: You don't have ice cream again, you merely have frozen ice cream mix.

. . . . . .

[fols. 169-172] Q. Should that ice cream be maintained within that range constantly while it is in the deep freeze?

A. As long as it is being stored.

. . . . . .

[fol. 173] Q. To go back to the deep freeze, Mr. Levowitz, in the storage of ice cream in a deep freeze, is it of any [fol. 174] importance to keep the temperature within a constant range?

The Court: He has already testified to that. I said that I won't interrupt but I have it down here in my notes.

Mr. Engelman: I did not hear the answer to it.

The Court: Didn't you say that it should be kept at minus 5——

The Witness: Customarily from minus 10 to minus 20 and it can fluctuate 10 degrees in that range.

Q. Is it important to keep it within that range?

A. Not of such importance as one degree plus or minus would affect it particularly.

Q. What would the difference in range have to do with the texture of the ice cream?

A. If you are in that range, and as I indicated before, you could go to minus 5 for a good hardening, but when you go below minus 5, that is from zero to minus 5, you are going to get into difficulty in that it will take too long to harden and your storage will not be as efficient and you may have some shrinkage.

To explain what I mean by that term, if the temperature of ice cream increases towards zero or above zero, the ice cream will soften and you will lose air from it.

[fols. 175-176] In other words, it will collapse and we have what is called shrinkage. You may start with a full

container, for example, and if you keep it at the normal dipping temperature, which would be in the range of plus 8 degrees Fahrenheit to plus 13, you can see the ice cream subside.

We start with a full quart of ice cream, for example, in the usual domestic refrigerator, and after a couple of days it is no longer a full quart.

Q. At what point in a deep freeze will you start to get shrinkage?

A. You will get shrinkage if it is less than minus 5, but it would take quite some time before it would be susceptible —in other words, at storage say at minus 5, it would be about a month before shrinkage would become of practical importance.

* * * * * * *

[fol. 177] Q. At what temperature should a dispensing cabinet or chest be maintained at where it is used to receive [fol. 178] ice cream kept in a deep freeze at minus 5 to 4 degrees?

Mr. Sheneman: If your Honor please, may I suggest that the answer to that depends on when it is going to be served?

Mr. Engelman: The question assumes for proper service.

The Court: You need not assume it. What you are asking him is, if ice cream is stored at minus 5, when should it be taken out of that for service? When? It is a little but open on the ends.

Mr. Engelman: I don't think so. I think in the——

The Court: Let's see if he can answer it.

Q. Can you answer that question, sir?

A. I would like to suggest what is done commercially and you can judge for yourself accordingly.

Q. What we want to know is from your experience——

The Court: What is the custom in the trade?

Q. What is the custom in the trade and in the industry; are you familiar with that?

A. Quite.

Q. Tell us what it is.

A. The standard container for commercial service is a 2½-gallon can or a 10-quart can.

The Court: This was a 2½-gallon can?

Mr. Engelman: That's right.

[fol. 179] A. (Continuing) I think that everyone is familiar with those and you have seen them. Those cans are usually removed from the truck to the retailer, for example, or from the tempering or from the hardening room of the storage facilities, which you refer to as a tempering cabinet, and put in the bottom portion of a standard tempering cabinet, whose temperatures are maintained in the range of 8 to 13, which is the normal commercial practice in this market.

Q. The normal temperature is 8 to 13?

The Court: Above?

A. 8 to 13 plus Fahrenheit. This example that I am giving you is predicated on the New York type of ice cream which contains about 15 per cent of sugar.

Q. We are dealing with Horton's products in 1950.

A. Which is characteristic of the New York brands. At that temperature for the contents of that can to reach a good dipping temperature will take approximately twenty-four hours for the full can.

Q. A 2½-gallon can?

A. Yes, a 2½-gallon can.

Q. When you said a good dipping temperature, what do you mean by those words?

A. So that the normal fountain operation can remove ice cream with the use of a standard scoop without, shall we [fol. 180] say, extraordinary pressure.

. . . . . .

Q. As I understand you, sir, ice cream that is brought from a deep freeze which has a temperature of about 5 degrees below zero and is put in a tempering chest of 8 to 13 degrees above, in twenty-four hours it will be serviceable, is that right?

A. Within twenty-four hours the entire contents of any

container will then come to the prevailing temperature of the tempering cabinet, which would be between 8 to 13.

Now, at 8 degrees-plus Fahrenheit, a male fountain attendant can dip that ice cream fairly successfully. Where you have female help at fountains, you would go to the slightly higher temperature which would make the ice cream softer and easier to handle.

Q. Do you mean that in that way and within twenty-four hours the texture of the ice cream would become soft enough for proper service?

A. Yes.

Q. And it would be the type of ice cream that the public wants, is that it?

A. That's it.

[fols. 181-194] Q. By keeping the tub in that dispensing cabinet could you maintain the texture of the ice cream indefinitely?

A. No, the texture will change if you keep the ice cream in that cabinet for any greatly prolonged time.

Q. What do you mean by any greatly prolonged time?

A. A week or more, it will definitely affect the texture, even at that proper dipping temperature range.

Q. It will maintain that texture or serviceability within a range of about a week, would you say?

A. The texture will gradually change because at the temperature of 8-plus to 13-plus you are going to lose air more rapidly, and that is a factor of shrinkage.

Q. Would it affect it appreciably, would the fact that it remained within the cabinet for a week, would the ice cream become hard or icy?

A. If the temperature is kept constant it will not become icy and it will be at a proper dipping temperature, but, let me explain this, if the ice cream is not used there will be shrinkage.

* * * * * * *

[fol. 195] DAVID LEVOWITZ resumed the stand.

Direct examination (continued).

By Mr. Engelman:

Q. Mr. Levowitz, I show you Plaintiff's Exhibits Nos. 3-A and 3-E. The testimony in this case is that the ice

[fols. 196-197] cream that the plaintiff was working on attempting to make in balls at the time he had this accident was in a cabinet or chest such as illustrated in those photographs.

Does that externally, so far as external construction is concerned, appear to be the ordinary type of dispensing chest?

A. Well, it is shallower than the usual commercial model, which is two cartons deep. This one appears to be only one carton deep.

Q. And you will notice in one of these photographs a tub of ice cream. From the appearance of the tub could you tell us how much ice cream that tub would contain? The testimony is that the tub on which Ferguson was working was similar in size to that particular tub.

A. Well, I can assume that it is a 2½-gallon can.

Q. It has that appearance?

A. Yes.

Q. When you say can, do you mean a cardboard container?

A. Yes, a cardboard single service container.

Q. I think you told us before we adjourned that the usual and customary temperature when they put ice cream in a dispensing chest, such as illustrated in those photographs there, was at 8 to 13 degrees, is that right?

A. Yes.

. . . . . .

[fol. 198] Q. Let us take a tub of ice cream, sir, that has been down in a deep freeze at approximately 5 degrees; you bring it up and put it into a tempering chest, and I think you said in order to serve it for dipping at 8 to 13 degrees, it should be in there for a period of twenty-four hours, is that right?

[fol. 199] A. Yes, that is right, to dip the entire contents.

Q. If it is in there for a period of about seven hours, what part of the ice cream can you dip out into balls to serve?

The Court: With that same temperature?

Q. With that same temperature.

The Court: I will take it that way, if he knows.

A. Probably about the top quarter or third.

Q. As the ice cream is tempered, it will soften where, in what part of the chest?

A. In this type of cabinet, at the top and at the sides.

Q. And why is that so?

A. Because the bottom is resting on the cold surface so that it will thaw very, very slowly, if at all. The upper portion is going to be affected by the air, which would be, if this is a normal tempering cabinet, between 8 and 13 degrees Fahrenheit.

Q. How long would it take for the bottom half of the tub of ice cream to reach a temperature where it can be served with a scoop?

A. I would say twelve hours-plus, that is, twelve to twenty-four hours before the entire contents would be soft enough to dip.

The Court: That is at a tempering temperature?

The Witness: Yes, eight-plus to thirteen-plus Fahren- [fol. 200] heit.

The Court: That is for the whole thing?

The Witness: Yes.

Q. So that if I understand your testimony, the ice cream will soften from the top down?

A. Substantially.

Q. It will reach a temperature then in the top areas equivalent to the temperature maintained in the tempering chest, is that right?

A. It will approach it.

Q. It will approach it?

A. Yes.

Q. And then the bottom portion of the ice cream would be——

(Mr. Sheneman rises.)

The Court: Is there an objection?

Mr. Sheneman: I don't mind leading but——

The Court: The question was already asked and answered and he is just summing it up.

Q. How long would the bottom part of the tub remain

at a temperature of 5 degrees below zero, which was the temperature when it was in the deep freeze?

A. Between twenty and twenty-four hours, that is, the last portion of the carton to soften.

Mr. Engelman: I think that is all.

Mr. Sheneman: If your Honor please, I have enjoyed his testimony and it was very enlightening but I suggest [fol. 201] that there has been no tieup between the observations that this witness has made and the conditions on board the ship, and I respectfully ask that his testimony be stricken.

The Court: No, I am not going to strike it. There are some general facts in there that may aid us. The last testimony particularly was based upon a certain temperature in the box and there is no testimony here about that, I agree with you, but I am not going to strike it out.

Cross-examination.

By Mr. Sheneman:

Q. From your long experience in the ice cream business have you learned anything about how to dip it out of a container?

A. I believe so.

Q. And what is customary to use?

A. A round—a hemispherical dipper.

Q. Anything else? How about a butcher knife, would you think that it would be a good practice to use a butcher knife?

A. It would hardly be a commercial dipping instrument.

Q. Do you think it would be a good practice to use a butcher knife?

A. No.

Q. Have you ever seen a dipper placed under a hot faucet?

A. Yes, I have.

Q. Does it work?

A. What is that?

[fol. 202] Q. Is it successful?

A. No.

Q. Why not?

A. The temperature of the dipper is going to be transmitted to the ice cream quite rapidly. It will penetrate hard ice cream to a slight degree, but following that there will be no further effect because the dipper is usually made of brass, nickel or chrome-plated and it is going to conduct the cold twice as rapidly.

Q. Suppose you put it into cold water?

A. If you put it into cold water it will penetrate even less, and there is a further criticism for that practice. If the dipper hasn't been dried you are going to introduce water into the ice cream. The ice cream is going to freeze those particles of water at the usual temperature at 32 degrees, so that the people who get the next portion of the ice cream will also have some ice with it.

Q. You say that you are substantially acquainted with the ingredients in Horton's ice cream?

A. Yes.

Q. Was there any difference between the ingredients in 1949 and 1950?

A. Depending on the price of milk powder, there may have been some changes in the formulation.

Q. What about 1950 and 1951?

A. I wouldn't be able to discriminate on months. I know that the general formula would vary in certain months, [fol. 203] depending on the market prices of the ingredients.

Now, as to the composition of fats and solids and so on, there have been no significant changes in the past twenty years in the Horton brand.

Q. Is there any difference in the ice cream which they serve commercially in and around New York and the ice cream which they serve aboard ships?

A. I don't know.

Q. There might be?

A. I doubt it.

Q. But you don't know?

A. I don't know.

Mr. Sheneman: That is all.

* * * * * * *

Mr. Engelman: The plaintiff will rest his case.

The Court: Plaintiff rests.

Mr. Sheneman: If your Honor please, may I ask that the jury be excused?

The Court: Yes, all right. There are some motions to be made now with which the jury has nothing to do. It is a matter for me, and so the jury may step out for a few moments.

(The jury left the courtroom.)

[fol. 204] The Court: All right.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Sheneman: I would like at this time to move for a directed verdict on the grounds that are set forth in my motion papers. May I read them into the record?

The Court: Yes.

Mr. Sheneman: The defendant moves for a directed verdict on the following grounds:

1. The evidence does not warrant a finding that the defendant provided an unseaworthy ship——

The Court: Wait a minute. I don't think there is any question here that it was an unseaworthy ship.

Mr. Sheneman: This continues, your Honor:

—unseaworthy ship, appliances or material for the use of plaintiff.

The Court: I don't think there is any claim here of an unseaworthy ship. I have the complaint in front of me. What paragraph is it in?

Mr. Sheneman: Well, it is under the general allegations of negligence where it alleges——

The Court: I still say that there is nothing in here about an unseaworthy ship or unseaworthy material. It is tried solely on the question of negligence apparently.

Mr. Engelman: That is right.

The Court: All right. Next.

Mr. Sheneman: 2, which follows 1, your Honor, and since [fols. 205-208] it also refers to unseaworthiness, I will eliminate it.

3. The evidence is insufficient to warrant a finding that the defendant was guilty of negligence which was the proximate cause of the p tiff's injuries.

4. The evidence is insuffi nt to warrant a find- that the

defendant was guilty of negligence which contributed to plaintiff's injuries.

5. The evidence does not warrant a finding that the defendant provided plaintiff with an unsafe place to work.

And lastly, the defendant is not responsible for an accident resulting to a seaman by reason of the unnecessary use by the seaman of a dangerous implement in a manner for which the implement was neither designed nor adapted.

The Court: I will deny your motion.

* * * * * * *

[fol. 209] The Court: All right, you will put your stipulation on the record.

STIPULATION OF COUNSEL

Mr. Engelman: I will concede for the purpose of the record, at the request of the Court I read the entire examination of the plaintiff before trial and nothing appears in [fol. 210] any question and answer with respect to the use of the knife by the third baker other than that part which Mr. Sheneman read to Mr. Ferguson on cross-examination.

* * * * * * *

RENEWAL OF MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Now, the plaintiff has rested and the defendant has rested. Normally we would take up the defendant's case at this time but the defendant exercised the right which he has not to put in any evidence and therefore the case is finished as far as the evidence is concerned.

The motion which you made, I assume, at the end of the plaintiff's case, you now renew?

Mr. Sheneman: Yes, your Honor.

The Court: Do you want to put it on the record?

You need not pay any attention to this because you have nothing to do with it.

Mr. Sheneman: I will withhold that motion until the end of the case.

The Court: This is the end of the case now.

Mr. Sheneman: I will renew my motion for a directed

verdict on behalf of the defendant on the grounds set forth in the original motion which I made at the conclusion of the plaintiff's case.

[fols. 211-215] The Court: All right, the motion is denied.

* * * * * * *

[fol. 216] DEFENDANT'S REQUESTS TO CHARGE

1. The plaintiff has the burden of proving by preponderance of the weight of the credible evidence either that the vessel was unseaworthy or that the defendant was negligent and that such unseaworthiness or negligence was the proximate cause of the plaintiff's injury.

[fol. 217] 2. The mere happening of an accident or injury creates no presumption of unseaworthiness or that the defendant was negligent.

3. The defendant was not bound to furnish plaintiff with an accident-proof ship.

4. The shipowner is not an insurer of the safety of members of the crew.

5. If the jury shall find that there was unseaworthiness of the vessel or negligence on the part of the defendant, or both, which contributed to plaintiff's injury, and if the jury shall find that there was negligence on the part of the plaintiff which also contributed to the injury, then the amount of damages which the jury may find shall be reduced proportionately to the degree to which the negligence of the plaintiff contributed thereto.

6. The duty of defendant in any case to provide plaintiff with a safe place to work was not absolute; rather, it was a requirement of reasonable care under the circumstances.

7. Defendant was not responsible for any temporary unsafe condition resulting from degree of hardness of ice cream served by the plaintiff unless the vessel's officers or other employees actually knew of such condition or in the exercise of due care should have discovered said condi-

[fol. 218] tion prior to the plaintiff's accident.

8. There is no evidence that any agent, officer or employee of the defendant knew or should have known of any temporary unsafe condition relating to degree of hardness of ice cream which plaintiff was serving.

9. If you find that the officers of the vessel acted reasonably in carrying out their duties as officers, then your verdict must be for defendant.

10. Even of the jury find that the ice cream served by the plaintiff was of a harder degree than usual, that did not create a condition such as to be inherently dangerous or to call for inspection by the ship's officers in the absence of any report by the plaintiff as to said condition.

11. In determining the degree of care required on the part of the ship's personnel, the jury may take into consideration whether hardness of ice cream constituted an inherently dangerous condition and whether injury was to be anticipated by reason thereof.

12. The ship's officers and personnel had no reason to believe that even if ice cream should be of a degree of hardness greater than usual plaintiff would use a large, sharp [fol. 219] butcher's knife to stab or dig out the ice cream.

13. In considering whether plaintiff was negligent and the degree to which such negligence, if found, contributed to plaintiff's injuries, the jury may take into consideration whether the use of a large, sharp butcher's knife to stab ice cream was an obviously inherently dangerous procedure.

14. There is no evidence from which the jury may find that the refrigerating machinery was not operating properly on the day of the accident.

15. Defendant was not required for plaintiff's benefit to exercise vigilance to see that plaintiff did not use a dangerous implement in a manner for which it was not intended or designed.

16. The general concept of "a safe place to work" has not been extended for the benefit of a seaman to the voluntary use by the seaman of a dangerous implement in a manner for which said implement was neither designed nor intended.

17. There is no evidence from which the jury may find that the use by the plaintiff of a large, sharp butcher's knife to stab or dig ice cream was in any way reasonably necessary for the proper performance of plaintiff's duties.

(Recess to 2:15 p. m.)

[fol. 220] CHARGE OF THE COURT

The Court: Ladies and gentlemen, we have reached the end of this case, which has been well tried by good lawyers. I want to compliment them now upon the manner in which they have tried this case. They have been gentlemanly in their presentation of the facts, but nevertheless they have guarded their clients' interests well, as they should.

They had their duty to perform, as I now have mine, and in a very few minutes this case will be up to you and you will be undergoing the most serious part of your duty.

All I ask you to do is do your sworn duty, and by "duty" I mean justice to each party. And if you realize, as you should, that you should bring in a verdict which is based on the facts, and on the facts alone, and, of course, measured by the yardstick of the law which I shall give to you, then you will have done your full duty. If you bring in a verdict which is based on the evidence, the law and your [fol. 221] conscience, then you will have done no wrong and you will have brought in a verdict which will be right and for which no one can criticize you.

This is a negligence case. The plaintiff charges this defendant, its agents and servants, with negligence. That is the whole basis of this case.

The plaintiff is here seeking damages from the defendant, as he has a right to do. He is seeking money damages for injuries which he claims he suffered while working on the ship of the defendant and while he was doing his work. This accident took place on March 27, 1950.

Now negligence is generally defined as follows: Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's own property or person.

Now the defendant is here resisting, as it has a right to do. It says that nothing the defendant did or failed to do may be imputed as negligence; that the accident to the plaintiff was not caused by its negligence or the negligence [fol. 222] of its agents or its servants.

And while I am here speaking, of course, this defendant

is a corporation and it can only act, of course, through its agents and servants. A corporation is a dead thing as far as doing anything is concerned. It has no hands and no feet, it cannot see and it cannot hear. But it feels and sees and hears and acts through its agents and its employees. So that a corporation is liable for the negligent acts of its agents or servants when those acts are performed in the ordinary performance of their duties.

As I say, the defendant says that the accident to the plaintiff was caused not by its negligence or failure to do anything, but by the plaintiff's own negligence and carelessness, and that the plaintiff himself was guilty also of contributory negligence. The two are separate and distinct. One is sole negligence on the part of the defendant and the other is contributory negligence. They are not the same. So that we have here an issue of fact.

As I said before, this is a negligence case and there must be some negligence or want of care in the case on the part [fol. 223] of this defendant, its agents or servants, or the plaintiff cannot win.

You are to say at the outset whether or not the plaintiff has made out a cause of action against this defendant, and your verdict must be based, as I told you, on the evidence, measured by the yardstick of the law which I am giving you.

You are the triers of the facts, and your verdict, as I say, must be based on the evidence. It must be an unbiased verdict. It must not be colored by sympathy or by any other outside consideration. Sympathy for the plaintiff must not enter into your consideration or prejudice of any kind. The fact that the defendant is a corporation must in no way influence your verdict.

In other words, it is the evidence and the testimony as it came from the mouths of the living witnesses before you —that is testimony. Further, it is the testimony of inanimate witnesses, such as the exhibits, and then there is the testimony in the depositions. The witnesses who gave those depositions did not appear before you, but that is testimony in the case. Testimony from living witnesses, deposition testimony, testimony by inanimate things and [fol. 224] exhibits in the case—from that you must deduce your verdict.

I tell you further that no deduction is to be drawn by you from the fact that the Court has denied motions to dismiss. This is merely a legal process and something over which you have no control. I am sending this case to you to decide upon the facts and in accordance with the law which I am laying down to you. You must, however, follow my directions and abide by them. You cannot disagree with me on the law.

Any statements made by counsel either in the openings or in summations are not to be taken by you as evidence. The evidence is that which I have told you before, which was produced here before you from the witness stand, from the exhibits, and from the depositions.

I also charge you that where the Court or counsel at any time related to testimony or referred to it, if such reference or relationship to the testimony differs from your recollection of it, your recollection is that which counts and you may disregard any statement made by either counsel or by the Court of testimony with which you disagree. Follow [fol. 225] your own recollection because, as I said and again reiterate, you are the sole judges of the facts, and if my memory differs from yours adhere to your own.

The jury may draw inferences from testimony but only such direct inferences that one might normally draw from a given state of facts. You may not draw an inference from an inference. You may not guess. You may not surmise. You may not pull a verdict out of the thin air.

When you go to your jury room, the exhibits will not be sent to you; however, the clerk has made a list of the exhibits and he will hand it to the foreman as he leaves the room and you may send in from time to time for such exhibits as you desire.

Generally, the plaintiff complains of the defendant as follows. In the first place, there are some allegations in the complaint which I will not read because there is no dispute about them: That the defendant was the owner and managed the steamship Brazil—there is no dispute about that—and that the plaintiff was an employee or sailor on the ship, and that on that ship he was a baker.

Now, as to the specific charges, some of which perhaps do not apply now because the proof did not go that far

[fol. 226] but, however, that is for you to say—the allegations or the charges that the plaintiff makes against this defendant upon which he bases negligence is that on or about the 27th of March 1950 while the plaintiff was engaged in the course of his duties aboard the steamship Brazil in attempting to free from its container ice cream which was excessively frozen so that the same could be served, he was caused to sustain serious and permanent personal injuries.

The plaintiff was injured, as aforesaid, wholly and solely through the negligence of the defendant, its agents and servants and employees, and without fault on his part, in failing and neglecting to provide plaintiff with a safe place in which to work, and in failing and neglecting to provide him with safe and competent superiors, fellow servants and co-employees; and in failing and neglecting to take the customary steps to protect the plaintiff's person; and in failing and neglecting to carry out the work in a safe and proper manner and through the negligence of defendant's agents, servants and employees, and then by reason of the said personal injuries, he has become disabled and has [fol. 227] suffered physical pain and so forth. That is generally the charge.

It amounts to this: that the plaintiff says, you did not give me a safe place to work because the material I was to work on was a dangerous substance, if it was dangerous to work on; and you did not provide me with proper tools and materials to work with and therefore that made it an unsafe place to work. That is generally, as I say, the statement which the plaintiff makes in his claim. There is no dispute, as I say, that this man was working there getting ready to serve these people in the dining room.

And the defendant denies this in its answer. The defendant denies that it was negligent in any way. It denies that it failed to do that which a normally prudent person would do or would not do, to provide him with a safe place to work, and that there was nothing dangerous about the substance; that it gave him and furnished him with proper tools, and that what he did was something on his own, using a dangerous instrument, and that he himself was guilty of negligence. And furthermore the defendant says that even

assuming that we were negligent, and not admitting that we were, the plaintiff himself was guilty of contributory [fol. 228] negligence—and I will charge you about that later.

That creates an issue, an issue that you have to try and determine.

The plaintiff has put on his case, and from that evidence he asks you to find substantially as he charges—negligence in at least one of the elements that he charges in his case. The defendant says it isn't so and, as I say, they deny negligence and set up contributory negligence. That is the issue.

Now the defendant has put on no witnesses. That, however, does not preclude them from still claiming their defense. In other words, the defendant says, as it may rightfully say and as it has a right to say: We put no testimony in here because the plaintiff has failed to make out a case, he has failed to prove that we were negligent; he has demonstrated, as we have demonstrated through cross-examination and through our examination of him and through the cross-examination of the other witnesses, that he himself was guilty of negligence which was the approximate cause of the accident and we were not, and therefore he cannot recover; or assuming that we were negligent, he himself [fol. 229] was guilty of contributory negligence, and that precludes him—it does not preclude him from recovering, but then I will charge you about the result of that later.

Now, as I say, the fact that the defendant put on no evidence does not mean that the defendant has abandoned its defense here. It does not mean that you have to find for the plaintiff because no evidence was put on for the defendant, but you are to take the plaintiff's case as the whole case, and then say; Has the plaintiff made out a case, or, from the evidence produced before you, has the defendant. Has the plaintiff made out a case first?

As to contributory negligence, you may say, or the defendant will say: We have the burden but we have met it by our cross-examination of the plaintiff. I hope you understand that now because that is the rule: That the defendant may put on evidence in its defense and it may not. But in not doing so he waives none of the defenses that

he raises and you may not state that he has waived any of them. However it is, in the last analysis, for you to say whether or not the plaintiff himself has made out a case [fol. 230] and whether or not he is free from contributory negligence.

What are the rights of the parties here? That is the next thing. From a general proposition, I shall give you the rules that apply to a situation such as this.

A ship, an owner of a ship, a sailor. A sailor is hurt. What are the duties and obligations of the ship? And when I say "the ship" I mean the owner of the ship. What are the duties and obligations of the defendant—of a defendant in a case of this kind?

Well, this is the general rule. In a case of this kind, and in this case, the defendant owed the plaintiff a non-delegable duty. Non-delegable means that it is a duty which cannot be discharged by delegating it to others. The defendant owed the plaintiff the non-delegable duty of providing the plaintiff with a safe place to work and with sufficient, adequate and suitable tools in order to carry out the work that was assigned to the plaintiff. As applied to this case, and as the plaintiff alleges, it means tools or appliances that were safe, adequate and suitable to do the job of making balls of ice cream from the ice cream [fol. 231] furnished by the defendant.

The defendant stored the ice cream aboard its ship. It is chargeable with whatever knowledge it had as to the characteristics of the ice cream which it stored, under the conditions it stored it, as well as the knowledge that it could obtain from exercising reasonable care.

In considering the defendant's obligation to provide the plaintiff with a safe place in which to work, safe materials on which to work, and with safe, adequate and suitable tools to carry on the work, you are to impute such knowledge to the defendant, that is, the knowledge it would have obtained about the ice cream and its characteristics which it could have obtained by the use of reasonable care.

All of those persons employed aboard the Brazil who had anything to do with the storing of the ice cream, the refrigeration of the ice cream, the maintenance and repair of the equipment refrigerating the ice cream, the handling,

moving and serving of the same, were fellow servants and co-employees of the plaintiff. The defendant is liable for the negligence of any one of them which was the proximate cause of the occurance of this accident.

[fol. 232] Proximate cause—it might be a good idea to tell you about that here. There have been reams of paper written about what proximate cause is. Numerous opinions have been written about proximate cause. Generally speaking , it may be a concurring, contributing or sole cause of an accident. Proximate cause may refer to one or more events or circumstances. It is a cause without which something could not have happened. It need not be the major cause and there may have been more than one proximate cause, although each contributed to the result in equal degree. Proximate cause is that which in a natural and continual sequence produces the event.

I have given you the rules and generally it is this: That the defendant has the duty to provide for a sailor on a ship a reasonably safe place to work—a reasonably safe place to work under all of the circumstances and under the conditions existing.

Now, the mere happening of an accident or of an injury creates no presumption that the defendant was negligent. Accidents may happen and they may not have negligence connected with them.

The defendant was not bound to furnish the plaintiff with [fol. 233] an accident-proof ship. The ship-owner is not an insurer of the safety of the members of the crew. The duty of the defendant to provide the plaintiff with a safe place to work was a requirement of reasonable care under the circumstances.

The defendant was not responsible for any temporary unsafe condition resulting from a degree of hardness of ice cream served by the plaintiff unless the vessel's officers or other employees actually knew of such condition, or in the exercise of due care should have discovered said condition prior to the plaintiff's accident.

In connection with this, you may take into consideration all of the circumstances of the case: The manner of storing, the manner of unfreezing it, shall we say, of preparing it for service. In other words, take it all into consideration.

You may take into consideration as part of the whole picture and as to whether there was any negligence on the part of this defendant and its officers and agents—at least one of the things you may consider in arriving at your conclusion, as to whether or not there was any negligence on the part of this defendant, the fact that the ice cream served by the plaintiff was of a harder degree than usual, [fol. 234] and in connection with that you may ask yourself: Did that create a condition such as to be inherently dangerous or call for inspection by the ship's officers in the absence of any report by the plaintiff as to such condition.

You may take into consideration, as one of the elements which you may consider, as to whether or not the ship's officers and personnel had any reason to believe that even if ice cream should be of a degree of hardness greater than usual, whether they could anticipate that the plaintiff would use a large, sharp butcher's knife to stab out the ice cream or dig out the ice cream.

And you may take into consideration also whether or not they could have reasonable and should have anticipated that the use by the plaintiff of a large, sharp butcher's knife to get out the ice cream was in any way reasonably necessary for the performance of the plaintiff's duties.

In determining the degree of care required on the part of the ship's personnel, the jury may take into consideration whether hardness of ice cream constituted an inherently dangerous condition and whether injury was to be [fol. 235] anticipated by reason thereof.

Now I have given you the yardstick by which to measure the duties or the obligations of the defendant.

Now let us look at the circumstances and the facts for a moment to see to what we have to apply this yardstick, the yardstick by which you measure the defendant's duty to the plaintiff.

I am not going to go into the evidence deeply, but, however, I think I should refer to it, not too much, but the fact that I mention some things and don't mention others does not mean and I don't want you to think that I am highlighting any part of it. It must be well within your knowledge now, since the case did not take long to try, but I think perhaps I should outline briefly for you the plaintiff's case in

general, from which the defendant says that you must draw the conclusion that there was no cause of action here.

Now the plaintiff has read the deposition of one, an employee of the defendant. I think he was a chief refrigerating engineer. Well, his testimony was not of great length. It had to do with the storage of the ice cream. The ice [fol. 236] cream was stored down in the lower holds of the ship. I think is was D deck. He himself did not have a key to it, but the baker had the key, and it was stored there and under refrigeration, and then, when required it was taken up and put in the box up at the baker's place so that it would get soft enough so that they could use it.

His testimony was generally about the temperatures, and my recollection is that he said that in this refrigerating unit downstairs or down below there was a temperature of 5 degrees below zero, and that the freezing machine went off when it was 5 below, automatically went off, and then went on when it got to be about 4 degrees or less, and then it started up again automatically.

There has been talk here about defects in the machinery and the machinery being defective at times. My recollection is that—and I think that was from the plaintiff himself—he had no recollection that the machinery was out of order that day.

Well, of course, whether it was or not you cannot deduce from the evidence, and whether it had any effect upon this thing or not, because my recollection of it is, and, however, [fol. 237] it is yours that counts and not mine, that any defect in the machinery that might have been testified to would tend to soften the ice cream and not to harden it, and the complaint here is that the ice cream was too hard. I don't think that there was any intimation or any information from which you can draw the conclusion that the temperature was too low downstairs. However, it is not my recollection that should count but it is yours. As I say, there was testimony that there was trouble with the machinery from time to time, but my recollection is that there was no positive testimony that there was anything wrong with it on this day.

Then the plaintiff took the stand himself and he testified that he was working on this ship on this day as a second

baker and he went on watch I think around 8 o'clock at night, and it was his duty to serve ice cream. The ship was a passenger ship with a 500-passenger capacity, and the ice cream was stored up in the box, up where the second cook worked, and where the plaintiff worked. You have seen pictures of it and there is no use in my describing it for you. The pictures are here if you want to see them. [fol. 238] He testified that he had an order for 12 portions of ice cream, and that he had a full carton and a half there, and that previously he had filled orders for ice cream from the half carton, and that finally gave out and then he went on the other one, and he worked on it, and I think he got half way through, he said, and it got hard, and he couldn't use the scoop that he was furnished with. And, of course, he was not injured with that scoop. There is no question about that. He did not attempt to use it, and then he said that he took this butcher knife—not a butcher knife, but a large knife, a very large knife, which he himself described as sharp as a razor. It was used for cutting French bread. He said that he took it and put it in the ice cream, around the sides, and he struck a hard place and his hand slipped down with a sudden stop of the knife, and he was injured.

There is no dispute that he cut his fingers. There is no dispute that he cut his hand that way. The only thing about it is whether or not the defendant should be held for that accident on the ground of negligence on the part of the defendant and its employees. Then, as you know, he received first aid treatment from the nurse. He had it [fol. 239] bandaged up. He landed at New York and he didn't do any more work.

He said, "My hand slipped down the blade of the knife." He said that he used this knife before and he had seen others use it. My recollection is that the defendant produced a deposition in which he stated that he had never used it before and this was the first time, and on the stand here he said that that was a mistake. At any rate, he claims that he used it. He said that he had to get his orders out, and he had been told by the chief cook or the chef that when the waiters came they should get what they asked for and that the passengers should be given good service. He said that there was no other tool aboard the vessel to use and that he found this alongside of him, as a matter of fact.

He said that he jabbed around until he could get small pieces out with which he could make a ball. Of course, he had nothing to do with bringing the ice cream up there. That was delivered by some other member of the crew. It was there for him to use.

My recollection is, although he hadn't seen it done, that [fol. 240] ice cream had been brought up shortly after the noon meal, and put in this cooler. I believe it is an unfreezer and I believe that its equipment was at the bottom of the cabinet. He said that the knife was there, and he called it a French knife. I think it was used to cut French bread with. He said that this knife was an improper tool. On cross-examination he said that it was improper to use, that the knife was to be used to cut French bread, not to cut ice cream. That was on the cross-examination.

Then there was a witness produced by the plaintiff, an expert ice cream maker, and he told you about the manner and means of storing ice cream, and he stated that ice cream which had been frozen at 5 degrees or lower and put in a temporary cabinet, which had a temperature of 8 to 13 degrees above Fahrenheit, that it would take about 24 hours to be able to dip it out properly.

Of course, there is no testimony here as to what the temperature was in the cooling off box upstairs. We don't know what that was. There wasn't any testimony about that.

I think he also testified on cross-examination that it was [fol. 241] not good practice to use a butcher knife to scoop out or to get out ice cream.

Now the plaintiff has produced something here which they say would have done it, and the defendant has also produced a spoon, a large spoon, which rather by inference they say he could have used. As I say, it was the defendant's duty to supply tools but only tools which were reasonably safe and suitable.

Now, then, just a brief word about the plaintiff. As you know, he got off the vessel and he went to Hudson and Jay. His hand had healed up, and he was finally sent over to the Marine Hospital. He was there a week and came back again, and they had x-rays taken, and then they operated on him. They performed an operation to help the hand a bit but they found that the operation was not successful,

and some time later they asked him to come back and two fingers were amputated because the tendons could not be repaired and the fingers were stiff.

Now my recollection is that the plaintiff was in and out of the hospital until some time in October 1950. I think he went to work again in November 1950. Then he says he [fol. 242] did not go to sea. Well, he did go to sea a couple of times, but he said his hand was stiff and he could not work any more as a baker because he could not do certain things, and he has taken other jobs since which he says are with less pay and does not make much money.

Now, generally and briefly that is the testimony that has been given here. As I said, I have not reviewed all of it for you. If you want any part of the testimony read, you may have it read at any time that you wish.

Well, now, I have given you the rules and I have given you the facts as to which you can apply those rules.

Now, the burden of proof is on the plaintiff to prove his case and all the elements of his case: One, that an accident took place, and that there is no dispute about. Secondly, that the accident was caused by carelessness and negligence of the defendant, its agents and servants, and that such accident was the proximate cause of his injuries.

Those are the elements of the plaintiff's case and those he must prove by a fair preponderance of the credible evidence. In other words, he has the laboring oar at this [fol. 243] time to prove the accident, the negligence and want of care of the defendant. The burden of proof means the quality of the proof and does not necessarily mean quantity. It is the quality of the proof in the main that counts. If the scales are even he has not come up to the requirements in connection with the burden of proof.

As I say, the term "preponderance of the evidence" means that on all of the credible evidence produced in this case, whether written or oral, an- on the fair and reasonable inferences that may be drawn therefrom, the weight must preponderate in favor of the plaintiff if the plaintiff is to be entitled to a verdict, no matter how slight the preponderance may be. That must be determined from the facts and the surrounding circumstances of this case.

If you find from the evidence that the plaintiff has failed to prove his case by a fair preponderance of the evidence,

or if you find that the evidence is evenly balanced, then the defendant is entitled to a verdict.

Now with regard to the witnesses: You have seen them on the stand. You have had full opportunity to observe [fol. 244] them and size up and determine what motive, if any, they had to tell the truth or not to tell the truth, and what interest they may have in the case. It is for you to decide whether you believe that on the essential facts the witnesses are telling the truth or whether they are not telling the truth. If you believe that a witness has made a statement with the intention of misleading you, you have a right to disregard all of that witness' testimony. If you believe that a witness has lied on a material fact in the case you may disregard his entire testimony; or you may disregard that which you believe not to be true and accept that which you believe to be true.

After all, you are the sole judges. You have seen the witnesses and you have heard the testimony, and you have a right to say what is the truth and what is not the truth. You can disregard it all or accept that which you believe.

It is the duty of the jurors in this case, as in all cases, to separate the truth from that which is not the truth, using his or her own determination, and his or her own judgment to determine what the real facts are in order that [fol. 245] you may arrive at a correct solution.

In connection with that, I say to you that the plaintiff is an interested witness. The plaintiff in any case is interested in the result and he is what we call an interested witness.

As to that I have been asked to charge by the plaintiff, and I think it is a fair charge, that while you may take into consideration that the plaintiff is an interested witness, you are entitled to give his testimony, if you believe it to be true, the same weight as that of any other witness in whose credibility you believe, and in considering the evidence you may consider also all of the probabilities of the case—all of the facts and circumstances of the case, I put it that way too.

Now that is generally about the charge on the law. So the first thing you have to determine is whether or not on the facts who is right and who is wrong. And, as I see it, this case has to do with ice cream, which the plaintiff says

was too hard to handle with the scoop which he had been afforded, and that there was nothing else there to use and so he used a sharp long bread knife, and I think it had a point on it. I am not sure of that, but it is your recollection [fol. 246] that counts, and he jabbed with that knife.

Now, based on the rules I have given you, was there any fault or want of duty on the part of the defendant, its agents and servants, in connection with that, or was the defendant negligent under the rules that the Court has given you.

And in connection with that, even considering that, even considering the ice cream, the hard ice cream, was the plaintiff justified under all the circumstances in using an instrument to do his job, using an instrument which was a dangerous thing to use, and was that the proximate cause of his injury. If he did that, if he used something that he had no right to use, was he justified in using it? If he wasn't, then he cannot recover. In that case you say he is solely negligent and therefore he can't recover. You are to say whether he should not have used it under the circumstances. It is for you to say from all the facts in the case whether or not he was justified and whether he should have used that instrument. It was a dangerous instrument, as it turned out any way, and an instrument which was not, intended for that purpose.

[fol. 247] Now the plaintiff says that he was carrying out orders, and I charge you that the general rule is that the duty of one who is a seaman is to act in obedience to the expressed and implied orders of his superior. A seaman does not assume the risk of even obvious dangers in carrying out such orders. Now I say to you that that is the general rule, and I also say that you may consider whether that applies to this case. There was no order on the part of any superior to use this knife. There was no order on the part of any of the superiors to get this ice cream out and use a dangerous instrument if you have to do it. There were no such orders, but the plaintiff relies on the general order that he was to take good care of his customers and take care of the orders that the waiters brought to him. May that be considered as in order to use the knife? I will leave that to you. That is for you.

Now, then, we start out, first, was there any want of

duty on the part of this defendant towards this plaintiff? Was that the proximate cause of the accident? At the same time you ask yourselves, was the plaintiff himself solely guilty of negligence? The fact that he used this knife, was that the proximate cause of the accident? Was he justified [fol. 248] in using that knife or not justified in using that knife, which turned out to be a dangerous weapon. You are to decide that and say who was proximately the cause of this accident, the plaintiff or the defendant?

Of course, if you say that the plaintiff was himself, then, of course, he has no cause of action. If you say that the plaintiff was not, then he is entitled to recover.

Now supposing you determine, after talking it over, and you come to the conclusion that the defendant is liable, then we come to the question of damages. And the fact that I speak of damages should not indicate to you in any way that I think he should have damages.. As I say, the fact that I speak of damages should not indicate to you in any way that I think the plaintiff should have damages, and when you come to the question of damages, if you decide that the defendant should pay, then you must transpose into dollars and cents that which he suffered by reason of this accident.

Well, now, I don't need to go into the details of it. You heard how he went to the hospital and how those fingers were taken off, and because he has these fingers off, that is [fol. 249] a permanent injury and it is a disfigurement and you can take that also into consideration.

The doctor who testified for the plaintiff testified that he examined him and that the man has lost 60 per cent of the use of the hand. That was his estimation of it. However, experts are only to guide the Court and guide the jury. You heard him testify and you saw the hand and it is for you to say what damage he suffered. As I say, you have to transpose into dollars and cents those things that he suffered, if you find he is entitled to a verdict. That comprises several items.

If the plaintiff is entitled to a verdict, he should receive damages which are adequate but not excessive, in such an amount as will fairly and justly and adequately compensate him; such amount which in your common sense and your judgment on the evidence you believe he is entitled to. In

estimating the damages you are to take into consideration the bodily injuries, disability, permanent or temporary, sustained, if any, by the plaintiff, and the pain and suffering caused by the injury, if any and fix the amount in such a sum, as I say, which shall be just, reasonable and [fol. 250] proper.

You may take into consideration any of these items. First, there was no doctor bills. You don't have a doctor's bill. Of course, you take in pain and suffering from the time of the accident down until such time as you find that he had pain and suffering and will have pain and suffering in the future. You take into consideration the wages which you find from the evidence the plaintiff has lost or would have lost from the time of the accident down until such time as he was able to go to work. My recollection is that it was some time in November 1950. You may also take into consideration the diminished earning power which the plaintiff has, from the time he first went to work until the present time, that is, a diminution in his earning capacity, if you find any, and that his earning capacity has been lessened.

My recollection is that his pay at the time of the accident was $289 with board and overtime. Then you may take into consideration how much his earning power will be lessened in the future.

The man is 60 years of age. He says he cannot work as a baker any more and he has been working at different [fol. 251] trades.

You may take into consideration also the permanent injury which he says he will have, the loss of his fingers. You add them all up, all those elements of damage, and say, if you find he is entitled to a verdict, and then fix that in one sum, and that is your verdict. In other words, you add up all the items of damage, put them all in one lump sum and say that is the verdict, if, as I say, you say he is entitled to a verdict and you are ready to give him a verdict.

There is one more item that I will charge you on, and that is the question of contributory negligence. I speak of it last not that I wish to highlight it in any way. I speak of it last because in this type of case it bears on damages. It does not come into your consideration unless an- if you

find for the plaintiff. So we will now take up the question then of contributory negligence.

Now, if you finally, as I say, give the plaintiff a verdict and you arrive at so much money, then you may take up for consideration the question of contributory negligence.

I have given you the general charge as to when plaintiff [fol. 252] should recover and when he should not recover, but if you find that he should recover and you fix a sum, say to yourself, "Now, was he guilty of contributory negligence?" Contributory negligence is not a complete defense. It is only a partial defense. Under the law it is a partial defense. You may apportion the damages sustained by the plaintiff and lay part of the plaintiff's injuries to defendant's negligence.

In order to get to the question of contributory negligence you already have to have found that the defendant was guilty of negligence and also that the plaintiff was guilty of contributory negligence. Then you say what proportion of the negligence each contributed to the accident. That is a difficult thing to do but it is the rule. You may apportion damages sustained by the plaintiff and lay part of the plaintiff's injuries to plaintiff's negligence, and the amount plaintiff should be entitled will be reduced thereby and the jury's verdict must be so much less.

Now contributory negligence means just what it says. Contributory negligence means, did the plaintiff in any way do something which was negligent, something which a [fol. 253] reasonably prudent person would not do, which caused or helped to bring about the accident which resulted in the injury.

If you find that the plaintiff was guilty of contributory negligence, you must reduce the amount of damages because of such contributory negligence. You must reduce the amount of damages in the same proportion which the negligence of the plaintiff bears to the total negligence of the accident.

Now we are talking about contributory negligence, and I spoke to you about sole negligence. Contributory negligence is different from sole negligence.

I don't believe I have charged you on that but I am sorry I have to do it at this late stage, and I am not accentuating

it here—I want you to know that. As I say, there is negligence and contributory negligence. The plaintiff was bound to use reasonable care for his own safety; he was to use that care that a reasonably prudent person would use under all the circumstances. If he failed to do that and such failure was the cause of his accident, he may not recover at all, but the jury are to say from all the [fol. 254] circumstances and facts and evidence here who was at fault in light of the law I have given you.

Now, on the other hand, we have what we call contributory negligence and I have told you about that. That is, assuming the defendant was negligent, and then you say the plaintiff himself was guilty of contributory negligence. That is just what I have been talking about.

The plaintiff has asked me to charge in connection with that, and I think it is a fair charge and I will charge it:

If you believe that the plaintiff was guilty of contributory negligence, that fact in itself would not be a bar to a verdict in the plaintiff's favor, providing that you also find that the negligence of the defendant or its other employees on board the vessel contributed to the accident. If you find that the plaintiff himself was guilty of contributory negligence, that he did something which contributed to the happening of the accident, something he should not have done, then you must apportion the damages according to the comparative degree of negligence of the respective parties. For example, if the plaintiff has been and [fol. 255] will be damaged to the extent of a given sum of money, a verdict based on said amount shall be reduced in proportion to the degree by which plaintiff's own negligence may have contributed to the happening of the accident, as compared to the degree of defendant's negligence.

I have charged at some length on this, but it is a difficult subject and I hope that I have made it clear to you. In other words, each is responsible in dollars and cents for his own negligence. I hope you understand that.

Your verdict in this case must be a unanimous verdict. There are no 10 to 2 verdicts here.

The burden of proving contributory negligence is upon the defendant. I gave you the burden of proof which the plaintiff had as to the happening of the accident and the

negligence of the defendant. That burden is upon the plaintiff, but the burden of proving contributory negligence, that the plaintiff himself was guilty of some negligence which caused or helped to bring about the accident, is on the defendant. The defendant has the laboring oar and the same general rule of burden of proof applies to [fol. 256] the defendant in connection with the question of contributory negligence as I have charged you before in connection with the burden of proof that the plaintiff has.

However, I state to you the fact that the defendant has put in no evidence is not a waiver of his right to claim contributory negligence, if you think it has been proven here.

You take this case and give it serious consideration. It is important to the plaintiff and it is important to the defendant. You must give it your earnest and serious consideration. Your verdict must represent the individual verdict of each juror. That does not mean each juror must stand apart. Discuss it with your neighbors and with your fellow jurors, and bring in a verdict which is a combined verdict of all of you, an honest verdict and a conscientious verdict. Bring in a verdict which satisfies your conscience and you have brought in a good verdict. It must be a unanimous verdict.

That is the case, give it the consideration that I have told you about.

The Clerk will hand you a list of the exhibits and you [fol. 257] may call for whatever exhibits you want.

* * * * * * *

EXCEPTIONS TO CHARGE TO JURY

The Court: Gentlemen, are there any exceptions or requests? The plaintiff is first.

Mr. Engelman: So far as exceptions are concerned, I want to except to that part of your charge in which you said that your recollection of the testimony was that there was no proof in the testimony that there was any defect in the refrigerating equipment on the day of the occurrence of the accident.

The Court: Yes, I will stand by that.

Mr. Engelman: I think that the reasonable inferences clearly indicate that there was——

The Court: Well, I told the jury that after all they were the sole judges of the fact.

Mr. Engelman: You did that.

[fol. 258] The Court: We may comment on the evidence here too.

Mr. Engelman: And I except to that part of your Honor's charge in which you said that the evidence indicated that the ice cream was brought up that afternoon.

The Court: After lunch?

Mr. Engelman: Yes. Well, on this particular day the proof was that that was the custom but nobody saw it.

The Court: I really took that statement out of your own brief that you gave me.

Mr. Engelman: That was before the trial.

The Court: Yes, it was.

Mr. Engelman: Then I do object to that part of your Honor's charge in which you say that the defendant was not required to furnish the best tools or equipment, because I don't think it has any application.

The Court: I took that out of the case that you gave me, the one you said would decide the whole thing, the Jenkins case.

Mr. Engelman: Those are my only exceptions.

Mr. Sheneman: If your Honor please, I respectfully ask your Honor to charge numbers 15 and 16 in the requests [fol. 259] to charge which I have handed to your Honor. I think you have spoken in general about the material in those two charges.

The Court: 15 and 16?

Mr. Sheneman: Yes, your Honor, and I am particularly interested in charging number 16.

The Court: 16?

Mr. Sheneman: Yes, sir.

The Court: What do you say?

Mr. Engelman: I object to both 15 and 16.

The Court: Is that a serious objection now?

Mr. Engelman: I mean that, sir.

The Court: You do not object just to object?

Mr. Engelman: I would not do that.

The Court: I would not want you to. If you are going to get a verdict here I would not want you to imperil it at the last moment.

Mr. Engelman: No, sir, I would not.

The Court: I think I will refuse to charge those requests.

Mr. Sheneman: I respectfully suggest, your Honor, that I do not think there is any doubt about the law.

The Court: All right.

[fol. 260] Mr. Sheneman: May I respectfully except to that?

The Court: Yes, sir.

* * * * * * *

[fol. 261] VERDICT

The Clerk: Members of the jury, have you arrived at a verdict?

The Foreman: We have.

The Clerk: How say you, Mr. Foreman?

[fol. 262] The Foreman: We agree on a verdict of $17,500.

The Clerk: Members of the jury, listen to your verdict as it stands recorded: You say that you find for the plaintiff in the sum of $17,500, and so say you all?

(Jurors nod in the affirmative.)

The Court: Do you want to poll the jury?

Mr. Sheneman: No, your Honor. May I renew the motions which I made——

The Court: Just a moment. I will let the jury go.

I want to thank you very much. You are discharged with the thanks of the Court, and I mean with the thanks of the Court.

(Jury left courtroom.)

MOTION TO SET ASIDE VERDICT OR, IN ALTERNATIVE, FOR NEW TRIAL AND DENIAL THEREOF

Mr. Sheneman: If your Honor please, I should like to renew the motions that I made at the end of the plaintiff's case and at the conclusion of the whole case. I should also like to move that the verdict be set aside on the ground

that it is excessive and against the weight of the evidence, or in the alternative for a new trial.

The Court: Your motions are denied.

If there are any other motions which you are entitled to [fol. 263] make at this time and which you have not made specifically, I will grant you permission to make within 10 days.

[fol. 264] DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 6-187

Cal. No. .....

HENRY FERGUSON, Plaintiff,

AGAINST

MOORE-McCORMACK LINES, INC., Defendant

JUDGMENT—February 11, 1955

The issues in the above entitled action having been brought on regularly for trial before the Hon. Edward A. Conger, and a jury, on February 7-8-&-10, 1955, and the jury having rendered a verdict in favor of the plaintiff, it is

Adjudged: That the plaintiff have judgment against the defendant, for the sum of $17,500.00.

Dated, New York, February 11, 1955.

William V. Connell, Clerk.

. . . . . .

[fol. 265] At a Stated Term of the District Court of the United States for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the 7th day of February, 1955, in the year of our Lord, One Thousand Nine Hundred and Fifty-five.

Present: Honorable Edward A. Conger, District Judge, Room #706.

Civil Jury

Docket No. 60-187

HENRY FERGUSON

vs.

MOORE-MCCORMACK LINES, INC.

Now comes the Plaintiff by George J. Engelman and moves the trial of this cause. Likewise comes the Defendant by Dow & Symmers by John R. Sheneman of Counsel.

Thereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial February 7, 1955. Trial Begun—Opening statements made by both Counsel February 8, 1955. Trial continued—Plaintiff Rests. Defendants' motion to dismiss complaint, Denied. Defendants' motion for a directed verdict for Defendant, Denied.

February 10, 1955—Trial continued—Defendant Rests. Defendants' motions renewed, Denied.

Summations made by both Counsel. Charge by the Court. Officers sworn. Jury retired and returned with a Verdict for Plaintiff in the sum of $17500. Defendants' motions renewed, and a motion to set aside the Verdict or alternative a new trial, Denied.

William V. Connell, Clerk.

(An Extract of the Minutes.)

[fol. 266] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1955

No. 138

Docket No. 23586

HENRY FERGUSON, Plaintiff-Appellee,

v.

MOORE-McCORMACK LINES, INC., Defendant-Appellant

Before: Clark, Chief Judge, and Medina and Waterman, Circuit Judges.

OPINION—January 18, 1956

Appeal from a judgment of the United States District Court for the Southern District of New York. Edward Conger, Judge.

Defendant appeals from a judgment for plaintiff entered on the verdict of a jury in an action brought under the Jones Act, 46 U. S. C. Section 688. Reversed.

George J. Engelman, New York City, for plaintiff-appellee.

Dow & Symmers, New York City (Wilbur E. Dow, Jr. and John R. Sheneman, New York City, of Counsel), for defendant-appellant.

[fol. 267] Medina, Circuit Judge:

Plaintiff was a baker engaged at the time of the accident in serving ice cream in the galley on C deck of defendant's SS Brazil. Using the standard ice cream scoop provided for the purpose, plaintiff disposed of the contents of a half used tub and had worked his way about half way down a full additional tub. There he found the ice cream "as hard as a brickbat," and the scoop became useless. So it occurred to plaintiff that about a foot and a half from where he was serving and "kept underneath the griddle" was a butcher knife, about eighteen inches long and as sharp as a razor, which might be used to chip the ice cream into small pieces. He was chipping away when his hand

slipped and he was badly cut, resulting later in the loss of two fingers of his right hand.

Strangely enough there is no claim that the vessel was unseaworthy. The negligence is supposed to stem from a failure to provide a safe place to work and safe tools and appliances. Reliance is also placed upon the fact that plaintiff had been directed to fill the orders brought into the galley by the waiters and it is said that there must have been something wrong with the refrigeration system or the ice cream would not have been so hard.

But no one in authority told plaintiff to use the butcher knife, which was customarily used in cutting French bread. The knife was properly in the galley and there was nothing defective about it. But it was never designed for or intended to be used as a dagger or ice pick for chipping frozen ice cream. And that it would be put to such use was not within the realm of reasonable foreseeability. *Manhat v. United States*, 2 Cir., 1954, 220 F. 2d 143, cert. denied, 349 U. S. 966. Cf. *Fitzpatrick* v. *Fowler*, D. C. Cir., [fol. 268] 168 F. 2d 172; *Wm. Johnson & Co. Ltd.* v. *Johansen*, 5 Cir., 86 Fed. 886.

There being no proof of fault on the part of the shipowner, defendant's motion for a directed verdict should have been granted.

Reversed.

[fol. 269] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY FERGUSON, Plaintiff-Appellee,

v.

MOORE-McCORMACK LINES, INC., Defendant-Appellant

JUDGMENT—January 18, 1956

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of rec-

ord from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this Court with costs taxed in favor of the appellant.

(S.) A. Daniel Fusaro, Clerk.

[fol. 270] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 271] Supreme Court of the United States

[Title omitted]

Order Allowing Certiorari—Filed May 21, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 272] Plaintiff's Exhibit No. 4

No. 438

Important.

(A) Investigate and report immediately every accident, however slight, to crew, stevedores or other persons.

(B) Obtain signed statements from all witnesses.

(C) Fill out and send this form without delay to owners.

(D) If possible take photographs and save all parts of machinery or gear

S.S. BRAZIL Flag U. S. A. Coy. No. 15.

1. Injured Person: Name Henry Ferguson Occupation Baker Address 3 East 3rd St., N. Y. C. Identification No. Z680220 Social Security No. 378-09-3322 Age 55 Color W Married No How many Children ..... Citizen of U. S. (nat) Where Born Scotland Name of nearest relative Sister—Chrisie Riresa Address 17 Havelock St., Hawick, Scotland.

2. Date man signed on 2/23/50 Where N. Y. C. Before whom U. S. S. C.

3. Date crew paid off 4/3/50 Where N. Y.

4. Date upon which man was paid off 4/3/50 Where N. Y. Before whom ..... Amount of wages paid .....

5. Wages per month 289.00.

6. (a) In whose employment Moore McCormack (b) How long employed 2 Years.

7. Injury received: (a) Date 3/27/50 (b) Hour 2040 hrs (c) Place Bake shop (d) To whom first reported Dispensacy (e) When 2050 hrs.

8. In what port was ship at time of accident At sea.

9. Describe fully how and where the accident happened I was serving ice cream, the cream was very hard and I was cutting it with a knife, my hand slipped down on the blade and cut the 3 4 5 fingers on my right hand.

[fol. 273] 10. Describe as fully as possible nature and extent of injury Laceration flexor surface right 4, 5 fingers just proximal to "B" joint with probable severence of flexor sublimis and profunda tendons in 4 and 5 fingers.

11. State what was done for the man after the accident with name and address of attending physician or hospital, if any. Examined after injury revealed no evidence if the tendon injury. But re-examination 12 hrs. later disclosed such injury. Pressure dressin- fingers immobolized in flexion over roller bandage. For tenorrfaphy in N. Y. C.

12. Give statement, if any, made by injured person .....

13. Name of person in charge or superintending work at time of accident. .....

14. Was man able to return to duty? Yes If so, when? Immed until signs of tendon injury were perceived, then taken from duty 3/29/50.

15. Was steamer loading or discharging? From or to dock or lighter? .....

16. What machinery or gear was in use, and was it in good order? .....

17. Was the man sober? Yes.

18. Was substitute signed on? ..... On what date? .....

19. Name of substitute .....

20. Name two prior employers of injured party U. S. Lines—Agwi Lines.

Date: 3/29/50.

Edw. A. Barbier, M. D. (Signature of Master, Surgeon or Officer).

Names of Witnesses to Accident and Persons Assisting in Work

None.

#263

Lloyd T. Jones—Waiter 615 Macdonough St., Brooklyn, N. Y.

(859-9)

No. 331 59

IN THE

Supreme Court of the United States

APRIL TERM, 1956

HENRY FERGUSON,

Petitioner,

v.

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE J. ENGELMAN;
Counsel for Petitioner,
Office & P. O. Address,
44 Whitehall Street,
New York 4, N. Y.

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Appendix

In the

Supreme Court of the United States

APRIL TERM, 1956

HENRY FERGUSON,

Petitioner,

v.

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Henry Ferguson, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which reversed the judgment of the United States District Court for the Southern District of New York, entered in favor of the Petitioner on a jury verdict, in a seaman's Jones Act case.

The Opinion of the Court Below.

No opinion was rendered in the District Court.

The opinion of the United States Court of Appeals for the Second Circuit by Judge Harold R. Medina is printed in the appendix hereto (pp. 15-16) and also annexed to the record of the Court below (D. App. 127-129)* and is reported in 228 F. 2d 891.

* Numerals following the letters "D. App." in parentheses refer to pages in Defendant-Appellant's appendix in the Court of Appeals and filed here.

Jurisdiction.

The decision and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was decided and entered on January 18, 1956, and is printed and annexed to the record of the Court below (D. App. 130-131).

This cause is brought under the Jones Act (46 U.S.C.A. 688) and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

The jurisdiction of this Court to review by writ of certiorari the judgment complained of is conferred by 28 U.S.C. Sections 1254(1) and 2101(c).

Questions Presented.

1. When a shipowner negligently fails to provide a necessary simple tool and a seaman in order to do his work uses a hazardous tool and suffers injury in its use, must he prove that the shipowner could reasonably foresee the use of the hazardous tool in order to make out a case under the Jones Act?

2. Is the defense of assumption of risk still available to a shipowner who negligently fails to provide a necessary simple tool but cannot reasonably foresee that a hazardous tool will be used to do the work in the absence of a necessary one?

3. Where a jury on ample evidence has found that a seaman was impliedly ordered to use a hazardous simple tool, does he assume the risk even though he used it in obedience of orders?

4. Where a jury on ample evidence has found that a shipowner could reasonably anticipate that a seaman would use a hazardous tool to do his work in the absence of a

necessary one, may such a jury finding be set aside in a Jones Act case in which the seaman has a statutory guaranty of trial by jury?

Statutes Involved.

The Jones Act, 41 Stat. 1007, 46 U.S.C.A. 688. The Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C.A. 51; 35 Stat. 66, 45 U.S.C.A. 54.

Statement of the Case.

Petitioner, a seaman, sued under the Jones Act for damages for personal injuries sustained because of Respondent's negligence (D. App. 1-3). At the end of Petitioner's case in the District Court, Respondent moved for a directed verdict; its motion was denied; Respondent then rested without offering any proof (R. 203-205, 206).* The jury returned a verdict for Petitioner for $17,500; the trial judge again denied Respondent's motions and judgment was entered for Petitioner (R. 261, 263). The Court of Appeals reversed, holding that Respondent's "motion for a directed verdict should have been granted" (App. pp. 15, 16).

Petitioner was employed by Respondent as a baker on its S.S. Brazil and it was one of his duties to fill the order of the ship's waiters for ice cream (R. 59, 60). On March 27, 1950, at about 8:40 p.m., Petitioner received an order from a ship's waiter for 12 portions of ice cream (R. 60, 70). The ice cream was in a 2½ gallon container setting in a refrigerated tempering chest in the bake shop (R. 63-66, 195, 196; see Plaintiff's Exs. 3A and 3E). Petitioner had been filling orders for ice cream from this container but when he got about half way down in the container, he found the ice cream "hard as a brickbat"; it was so hard that the hemispherical

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* Numerals following the letter "R" in parentheses refer to pages in the typewritten record of the trial, now filed in this Court.

scoop, the only tool Respondent provided for the work, was useless because it could not penetrate the ice cream (R. 60-62, 66-68, 72). Respondent did not provide a necessary tool for filling orders when the ice cream was too hard for the use of the scoop. An ice chipper (plaintiff's Ex. 5) would have broken the hard ice cream into small particles which could have been made into balls by the scoop; petitioner had used such a tool in that way in serving hard ice cream on other ships (R. 72-74). Petitioner worked under a superior, the ship's chef, who gave him this order: "When the waiters come up to get the orders, that they should get what they ask for and give them good service" (R. 71, 72). Lacking the essential ice chipper and under the compulsion of the chef's orders and the waiter's order for 12 servings, Petitioner took a ship's butcher knife kept nearby, grasped it and using it as a chipper, chipped the hard ice cream into small pieces which he formed into balls with the scoop to fill the order (R. 60-62, 69, 70). He made nine servings that way when the point of the knife struck a spot in the ice cream which was so hard that it caused his hand to slip down the blade of the knife and he suffered an injury resulting in 60 per cent loss of the functional use of his right hand (R. 70, 186).

Respondent stored its ice cream in a refrigerated box at 5 degrees below zero (R. 47, 48). Such ice cream is too hard to serve and must be transferred to a tempering chest and kept there at 8 to 13 degrees above zero for 12 to 24 hours before the entire contents of a 2½ gallon container becomes soft enough for dispensing with a scoop (R. 178-180, 198, 199). Respondent's tempering chest was set at zero to 10 degrees above zero which was too low for proper tempering or thawing of ice cream (R. 158). The tempering chest was not in good mechanical condition; Respondent's refrigerating engineer (Respondent took his deposition and Petitioner read it at the trial, R. 2, 3), testified that he could not say whether the chest was in working order and condi-

tion on the day of the accident (R. 16, 17); that they had trouble with it then and still have trouble with it which they cannot correct (R. 25, 26, 42), and that no readings of the temperature in the chest were made or kept (R. 37, 38). Respondent did not keep its ice cream in the tempering chest a sufficient length of time to become serviceable by means of a scoop. In answer to an interrogatory as to when ice cream for the evening meal was transferred to the tempering chest, Respondent answered: "Between the noon and evening meals if there was then an insufficient amount for the evening service already available" (R. 157). Petitioner testified that the ice cream for the evening meal was usually brought up about 1:00 o'clock in the afternoon (R. 77-79) but he did not know when the ice cream he was working on at the time he was injured was placed in the chest (R. 150-152).

Petitioner had nothing to do with the storage of the ice cream or its transfer to the tempering chest (R. 74), his only job with respect to ice cream was filling the orders of the waiters (R. 59).

As the uncontradicted proof shows that Respondent did not maintain its tempering chest at a proper temperature and did not keep its ice cream in the chest long enough to become serviceable throughout the container, Respondent knew that the sole tool it furnished Petitioner to serve ice cream with was not adequate for the work.

The Court submitted the case to the jury on well established principles of maritime law; that Respondent owed Petitioner the duty of providing a safe place in which to work, safe and adequate tools to do the work, safe ice cream on which to work, and that Respondent was chargeable with knowledge of the condition of its ice cream; that Petitioner, a seaman, was bound to obey the implied as well as expressed orders of his superiors (D. App. 98-122).

The Circuit Court of Appeals reversed on the sole ground that the use of the knife as an ice chipper, which Respondent failed to supply, "was not within the realm of reasonable foreseeability" (App. pp. 15, 16).

REASONS FOR ALLOWANCE OF THE WRIT.

ARGUMENT.

The common law doctrine of "reasonable foreseeability" of harm has never before been applied to defeat recovery in a Jones Act case based on a defective appliance or failure to provide an adequate one. In applying the doctrine, the United States Court of Appeals for the Second Circuit has established a new rule of law —which permits a shipowner to supply defective applinaces and fail to provide adequate or necessary ones unless he can reasonably foresee harm from his conduct —which is contrary to public policy, decisions of this Court, and other United States Courts of Appeal as well as its own prior decisions.

A shipowner has an absolute non-delegable duty of providing his seamen with safe, adequate and necessary appliances to carry out their work and the exercise of due diligence does not discharge that duty, *Pacific American Fisheries* v. *Hoof,* 9 Cir., 291 Fed. 306, certiorari denied 263 U.S. 712, 44 S. Ct. 38, 68 L. Ed. 520; *Carlisle Packing Co.* v. *Sandanger,* 259 U.S. 255, 66 L. Ed. 927, 42 S. Ct. 475; *Mahnich* v. *Southern S.S. Co.,* 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561; *Socony-Vacuum Oil Co.* v. *Smith,* 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262. The duty is recognized by the common law in non-maritime torts, *Mahnich* v. *Southern S.S. Co.* (supra). The duty is a continuing one which lasts all during the seaman's employment, *Pacific American Fisheries* v. *Hoof* (supra); *Cleveland-Cliffs Iron Co.* v. *Martini,* 6 Cir., 96 F. 2d 632. While breach of the duty may be enforced by an action

at law for unseaworthiness. *Seas Shipping Co. Inc.* v. *Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, it also may be enforced by an action for negligence under the Jones Act, *Socony-Vacuum Oil Co.* v. *Smith* (supra); *Krey* v. *United States*, 2 Cir., 123 F. 2d 1008. As the duty is non-delegable, not discharged by the exercise of due diligence, and is a continuing one, the shipowner's actual knowledge of breach of the duty need not be proved for it is always imputed to him. *Pacific American Fisheries* v. *Hoof* (supra). Therefore, the mere breach of the duty satisfies the negligence requirements of the Jones Act, *Storgard* v. *France & Canada S.S. Corp.*, 2 Cir., 263 Fed. 545, certiorari denied 252 U.S. 585, 40 S. Ct. 394, 64 L. Ed. 729; *Krey* v. *United States* (supra). This is so even where the shipowner has surrendered possession and control of his vessel to another, *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 25 F. 2d 339, aff'd 2 Cir., 32 F. 2d 182, and where the defective appliance is set up by an independent contractor, *Shields* v. *United States*, 3 Cir., 175 F. 2d 743. Mere breach of the similar duty to provide a safe place to work satisfies the negligence requirements of the Federal Employers' Liability Act where the injury was sustained on the property of another over which the railroad had neither knowledge nor control, *Terminal R. Ass'n of St. Louis* v. *Fitzjohn*, 8 Cir., 165 F. 2d 473.

To impose an additional element of negligence—"reasonable foreseeability" of harm—in Jones Act appliance cases, is to require proof of actual rather than imputed knowledge and to establish a new and novel rule of law permitting a shipowner to provide a defective appliance and to fail to supply an adequate or necessary one where there is no "reasonable foreseeability" of harm. Such a rule would permit the shipowner to escape liability in many instances for breach of his absolute duty to provide safe, adequate and necessary appliances.

Until this novel decision of the Court below, we knew of no decision in a Jones Act appliance case holding "reason-

able foreseeability" of harm a pre-requisite of recovery. The authorities cited by the Court below to support its holding do not do so and are not at all in point. *Manhat* v. *United States*, 2 Cir., 220 F. 2d 143, certiorari denied 349 U.S. 966, 75 S. Ct. 900, 99 L. Ed. 1288, did not involve a defective appliance or lack of an adequate one. It was a third party action brought by a repairman who sustained injury when one of his co-employees working inside a lifeboat with him released obvious, safe and proper lowering gear causing the boat to fall. The Court held that such an occurrence could not be foreseen. *Fitzpatrick* v. *Fowler*, D.C. Cir., 168 F. 2d 172, was a suit by a shoreside domestic servant for injuries sustained when she was tripped and fell in a hole on the floor covering on her working place. The Court held that she assumed the risk because she had knowledge of the defect when injured. In *Wm. Johnson & Co. Ltd.* v. *Johansen*, 5 Cir., 86 Fed. 886, a seaman was given new, unpliable rope and too short a toggle pin for use in rigging a boatswain's chair which caused it to fall while he was sitting in it and painting the mast. Although the seaman did not question the materials furnished and he could have obtained more suitable material or secured the chair in another way, the Court held he did not assume the risk but was guilty of contributory negligence and halved his damages.

Strangely, 36 years ago in a frequently cited case, *Storgard* v. *France & Canada S.S. Corp.* (supra), the Court below rejected the very doctrine of "reasonable foreseeability" it now enunciates; there a seaman, in ascending a mast, used a ring attached to a sail; the ring was not designed for that purpose and a defective bolt attached to it caused an injury; the seaman's action was one in negligence for maintaining a defective appliance and the Court of Appeals, in speaking of the shipowner's liability, said:

> "* * * It makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen."

This Court did not apply the doctrine of "reasonable foreseeability" of harm in defective appliance cases clearly calling for its application if it were available to the shipowner, *Mahnich* v. *Southern S.S. Co.* (supra); *Socony-Vacuum Oil Co.* v. *Smith* (supra). In both cases the shipowner provided a safe appliance and a seaman voluntarily selected an unsafe one, yet in fastening liability on the shipowner for breach of duty, this Court did not even discuss the doctrine.

This Court has often held that the Jones Act is remedial and designed to enlarge the rights of seamen; that in drawing from maritime and common law sources, Courts wherever necessary should liberalize the rules rather than restrict them by a refined process of reasoning or resort to old discredited common law concepts, *Jamison* v. *Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368; *De Zon* v. *American President Line*, 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065. It would be an anomaly to permit a duty recognized by the general maritime law and the common law to be watered down and restricted where the Jones Act is invoked to enforce it.

The contributory negligence rule as applied in Admiralty gives the shipowner ample protection against the seaman's negligence in selecting a hazardous appliance when a safe one is available or, as here, in using a hazardous tool where a necessary one is not provided, *Socony-Vacuum Oil Co.* v. *Smith* (supra).

As the United States Court of Appeals for the Second Circuit has pronounced a new rule of law completely out of harmony with its own prior decisions as well as the decisions of this Court and other United States Courts of Appeal, and as the rule may be seized upon to overrule established precedent and impair the harmony of our maritime law, we respectfully ask this Court to decide whether "reasonable

foreseeability" of harm is a necessary element of proof in a Jones Act case based on failure to provide a necessary appliance.

The shipowner has the same duties and liability with respect to simple tools that he has as to other appliances.

The Court of Appeals did not take notice of the fact that the tool which Respondent failed to provide—an ice chipper—and the tool Petitioner adopted in place of the ice chipper—a knife—were simple tools. In *Jacob* v. *City of New York*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, this Court held that the common law simple tool doctrine had no application in Jones Act cases. There the shipowner provided a monkey wrench "probably" adequate for the job but failed to replace a more adaptable type wrench which was worn and defective, after three requests for a new one had been made. A seaman chose the worn wrench and was injured. This Court held that the case should not have been dismissed as the evidence presented a jury question of whether the injury arose out of any "defect or insufficiency of appliances." In reviewing what the jury might find from the evidence, this Court said it might consider "whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use." Foreseeability of harm was one of the elements of negligence in the case as a request for a new wrench had been made three times, but it was not a necessary element as the authorities heretofore submitted demonstrate, and as this Court made no distinction between liability for simple tools and other tools and appliances, certainly the Court did not intend to establish a different rule in simple tool cases. We know of no authority holding that it did.

As the shipowner's liability in simple tool cases is a matter

of great importance to the maritime industry and this Court has made no pronouncement on the subject since its decision in *Jacob* v. *City of New York* (supra), fourteen years ago, we respectfully ask this Court to decide whether in cases invoking the Jones Act a shipowner's liability based on failure to provide a necessary appliance is any different where the appliance is a simple tool.

The common law doctrine of "reasonable foreseeability" sets up the defense of assumption of risk no longer available in seamen's appliance cases. The rule is no different in simple tool cases.

The United States Court of Appeals in applying the doctrine of "reasonable foreseeability" in effect held that although Respondent was negligent in failing to supply an adequate tool that Petitioner assumed the risk when he selected the hazardous knife to do his work. The Court thereby invoked a defense no longer available in seamen's appliance cases, *Socony-Vacuum Oil Co.* v. *Smith* (supra). There this Court held that a seaman who "could have avoided the use of the unsafe appliance by the free choice of a safe one" did not assume the risk and said:

> "* * * we feel confident that a sailor cannot be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice."

Petitioner had no choice of a safe tool. He had to weigh the alternatives of stopping the work and refusing to fill the order, or using the hazardous knife; and unlike Smith, he did not have a free and uncoerced choice of alternatives because of the orders of his superior, the chef, to give the waiters what they ordered and give them good service, and the order of the waiter for 12 portions of ice cream.

Under the Court's charge (D. App. 98-122), the jury verdict is a finding that Petitioner was impliedly ordered to use the knife. He was duty bound to obey such order, *Ruskin* v. *Minnesota Atlantic Transit Co.*, 2 Cir., 107 F. 2d 743. Long before the defense of assumption of risk was abolished by *Socony-Vacuum Oil Co.* v. *Smith* (supra), and later by the Federal Employers' Liability Act (35 Stat. 66, 45 U.S.C.A. 54) where injury resulted from negligence, the Court below and this Court held that a seaman did not assume the risk of using a defective appliance in obedience of orders as he is bound to obey them, *Panama R. Co.* v. *Johnson*, 2 Cir., 289 Fed. 964, aff'd 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748. But in denying recovery, the Court below necessarily held that a seaman is not duty bound to obey the expressed and implied orders of his superiors if they require the use of a dangerous appliance. This is contrary to bedrock maritime law declared by the Court below in *Darlington* v. *National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817.

We have found no other authority holding that a seaman might refuse an order to use a defective or hazardous simple tool, or that he assumed the risk in using such a simple tool in obedience of orders. In *Socony-Vacuum Oil Co.* v. *Smith* (supra), this Court impliedly indicated that assumption of risk is not a defense in simple tool cases for in concluding its opinion, the Court said:

> "We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty."

In *Jacob* v. *City of New York* (supra), this Court held that the simple tool doctrine did not apply to Jones Act cases, thereby placing simple tools in the same category with other appliances.

As the question is one of great importance to the maritime industry, we respectfully urge this Court to decide whether assumption of risk is a defense in simple tool cases.

Implicit in the jury verdict is a finding that respondent could have anticipated or foreseen that petitioner would use the knife in his work. In reversing, the United States Court of Appeals refused to respect that finding and thereby deprived petitioner of his right to trial by jury given to him by the Jones Act.

The trial judge did not charge the jury that Petitioner could not recover unless Respondent could have reasonably foreseen that he would use the knife (D. App. 98-122) and Respondent did not request such a charge (D. App. 95-98). The trial judge did charge that one of the elements the jury might consider was whether Respondent could have anticipated that Petitioner would use the knife (D. App. 107). The Court below refused to accept the jury's affirmative answer to that question and substituted its own finding for that of the jury, in holding that the use of the knife "was not within the realm of reasonable foreseeability"; it thereby usurped the jury's function and deprived Petitioner of the right to trial by jury given to him by the Jones Act. This Court condemned that practice in Jones Act cases in *Jacob* v. *City of New York* (supra). There the United States Court of Appeals for the Second Circuit (the Court below) affirmed the District Court in a similar case in refusing to submit to the jury defendant's neglect in failing to provide a more adequate wrench, and this Court said:

> "But that is no reason for a court to usurp the function of the jury: We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury."

We respectfully urge that this Court reaffirm the seaman's "statutory guaranty of the right of jury trial" in Jones Act cases, as it has done so often in cases under the Federal Employers' Liability Act.

CONCLUSION.

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted.

GEORGE J. ENGELMAN,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138—October Term, 1955

(Argued December 12, 1955 Decided January 18, 1956)

Docket No. 23586

HENRY FERGUSON,

Plaintiff-Appellee,

v.

MOORE-McCORMACK LINES, INC.,

Defendant-Appellant.

Before:

CLARK, *Chief Judge*, and
MEDINA and WATERMAN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward Conger, *Judge.*

Defendant appeals from a judgment for plaintiff entered on the verdict of a jury in an action brought under the Jones Act, 46 U. S. C. Section 688. Reversed.

GEORGE J. ENGELMAN, New York City, *for plaintiff-appellee.*

DOW & SYMMERS, New York City (Wilbur E. Dow, Jr. and John R. Shenehan, New York City, of Counsel), *for defendant-appellant.*

MEDINA, *Circuit Judge*:

Plaintiff was a baker engaged at the time of the accident in serving ice cream in the galley on C deck of defendant's

SS Brazil. Using the standard ice cream scoop provided for the purpose, plaintiff disposed of the contents of a half used tub and had worked his way about half way down a full additional tub. There he found the ice cream "as hard as a brickbat," and the scoop became useless. So it occurred to plaintiff that about a foot and a half from where he was serving and "kept underneath the griddle" was a butcher knife, about eighteen inches long and as sharp as a razor, which might be used to chip the ice cream into small pieces. He was chipping away when his hand slipped and he was badly cut, resulting later in the loss of two fingers of his right hand.

Strangely enough there is no claim that the vessel was unseaworthy. The negligence is supposed to stem from a failure to provide a safe place to work and safe tools and appliances. Reliance is also placed upon the fact that plaintiff had been directed to fill the orders brought into the galley by the waiters and it is said that there must have been something wrong with the refrigeration system or the ice cream would not have been so hard.

But no one in authority told plaintiff to use the butcher knife, which was customarily used in cutting French bread. The knife was properly in the galley and there was nothing defective about it. But it was never designed for or intended to be used as a dagger or ice pick for chipping frozen ice cream. And that it would be put to such use was not within the realm of reasonable foreseeability. *Manhat* v. *United States*, 2 Cir., 1954, 220 F. 2d 143, cert. denied, 349 U. S. 966. Cf. *Fitzpatrick* v. *Fowler*, D. C. Cir., 168 F. 2d 172; *Wm. Johnson & Co. Ltd.* v. *Johansen*, 5 Cir., 86 Fed. 886.

There being no proof of fault on the part of the shipowner, defendant's motion for a directed verdict should have been granted.

Reversed.

Supreme Court of the United States

OCTOBER TERM, 1956

No. 59

HENRY FERGUSON,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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OCTOBER TERM, 1956

No. 59

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BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the United States Court of Appeals for the Second Circuit is reported at 228 F. 2d 891 and is printed at pages 118-119 of the Record.

Jurisdiction.

The final judgment of the United States Court of Appeals for the Second Circuit was entered on January 18, 1956 (R 119-120). The petition for a writ of certiorari was filed on April 7, 1956 and was granted May 21, 1956 (R. 120). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1) and 2101 (c).

The Questions Presented.

1. Where a shipowner negligently fails to provide a necessary simple tool (an ice chipper) and a seaman in order to carry out the work he was ordered to do uses a knife which is a hazardous tool for the work and suffers injury in its use, must he prove that the shipowner could have reasonably foreseen the use of the knife in order to make out a case under the Jones Act?

2. Is the defense of assumption of risk still available to a shipowner who negligently fails to provide a necessary simple tool for his work but cannot reasonably foresee that a hazardous tool will be used to do the work in the absence of a necessary one?

3. Where a jury on ample evidence has found that a seaman was impliedly ordered to use a hazardous simple tool, does he assume the risk even though he used it in obedience of orders?

4. Where a jury on ample evidence has found that a shipowner could reasonably anticipate that a seaman would use a hazardous simple tool to do his work in the absence of a necessary one, may such a jury finding be set aside in a Jones Act case in which the seaman has a statutory guaranty of trial by jury?

The Statutes Involved.

Section 33 of the Act of June 5, 1920, C. 250, 41 Stat. 988, 1007, Title 46, United States Code § 688 known as the Jones Act, reads as follows:

> "Sec. 33. That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"Sec. 20. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action, all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The Federal Employers' Liability Act, 35 Stat. 65: 45 U.S.C.A., Sec. 51:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Federal Employers' Liability Act, 35 Stat. 66, 45 U.S.C.A. 54:

> "That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Statement.

Petitioner, a seaman, sued under the Jones Act for damages for personal injuries sustained because of Respondent's negligence (R. 1-3). At the end of Petitioner's case in the District Court, Respondent moved for a directed verdict; its motion was denied; Respondent then rested without offering any proof (R. 90-93). The jury returned a verdict for Petitioner for $17,500; the trial judge again denied Respondent's motions and judgment was entered for Petitioner (R. 115-117). The Court of Appeals reversed, holding that Respondent's "motion for a directed verdict should have been granted" (R. 118-119).

Petitioner was employed by Respondent as a second baker on its first class passenger ship Brazil and it was one of his duties to fill the orders of the ship's waiters for ice cream (R. 37-38). On March 27, 1950, at about 8:40 P.M., Petitioner

received an order from a ship's waiter for 12 portions of ice cream (R. 38, 44). The ice cream was in a 2½ gallon container setting in a refrigerated tempering chest in the bake shop (R. 40-42, 86-87; see Plaintiff's Exs. 3A, 3C and 3E). Petitioner had been filling orders for ice cream from this container but when he got about half way down in the container, he found the ice cream "hard as a brickbat"; it was so hard that the hemispherical scoop, the only tool Respondent provided for the work, was useless because it could not penetrate the ice cream (R. 38-39, 42-43, 46, 120-123). Respondent did not provide a necessary tool for filling orders when the ice cream was too hard for the use of the scoop. An ice chipper (plaintiff's Ex. 5) would have broken the hard ice cream into small particles which could have been made into balls by the scoop; petitioner had used such a tool in that way in serving hard ice cream on other ships (R. 46-47). Petitioner worked under a superior, the ship's chef, who gave him this order: "When the waiters come up to get the orders, that they should get what they ask for and give them good service" (R. 45-47). Lacking the essential ice chipper and under the compulsion of the chef's orders and the waiter's order for 12 servings, Petitioner took the only thing he could find, a ship's butcher knife kept nearby, grasped it and using it as a chipper, chipped the hard ice cream into small pieces which he formed into balls with the scoop to fill the order (R. 38-39, 44, 46). He made nine servings that way when the point of the knife struck a spot in the ice cream which was so hard that it caused his hand to slip down the blade of the knife and he suffered an injury resulting in the loss of two fingers of his right hand (R. 44-45, 39-40, 119). Petitioner and the third baker had previously used the knife on hard ice cream (R. 67-68).

Respondent stored its ice cream in a refrigerated box on D deck at 5 degrees below zero (R. 8-10, 30-32, 78-79). Such ice cream is too hard to serve and must be transferred to a tempering chest and kept there at 8 to 13 degrees above zero

for 12 to 24 hours before the entire contents of a 2½ gallon container becomes soft enough for dispensing with a scoop (R. 84-89). Respondent's tempering chest located in the bake shop, was set at zero to 10 degrees above zero which was too low for proper tempering or thawing of ice cream (R. 10-12, 80, 85). The tempering chest was not in good mechanical condition. Respondent's refrigerating engineer (Respondent took his deposition and Petitioner read it at the trial, R. 5), testified that he could not say whether the chest was in good working order and condition on the day of the accident (R. 13-14); that they had trouble with it then and still have trouble with it which they cannot correct (R. 19, 25-26, 29), and that no readings of the temperature in the chest were made or kept (R. 26-27, 80). In answer to an interrogatory as to when ice cream for the evening meal was transferred to the tempering chest, Respondent answered: "Between the noon and evening meals if there was then an insufficient amount for the evening service already available" (R. 79). Petitioner testified that the ice cream for the evening meal was usually brought up about 1:00 o'clock in the afternoon, but he did not know when the ice cream he was working on at the time he was injured was placed in the tempering chest (R. 50-51). Respondent did not keep its containers of ice cream in the tempering chest a sufficient length of time for the bottom half of the container on which plaintiff was working when injured to become serviceable or "dipable" by means of a scoop (R. 39, 43, 87-89).

Petitioner had nothing to do with the storage of the ice cream or its transfer to the tempering chest (R. 47-48), his only job with respect to ice cream was filling the orders of the waiters (R. 38).

As the uncontradicted proof shows that respondent did not maintain its tempering chest in an adequate state of repair and at the proper temperature for tempering or thawing ice cream and did not keep its ice cream in the chest long

enough to become serviceable or dispensable throughout by means of a scoop, the sole tool it provided, Respondent knew but it failed to provide an adequate tool for dispensing its ice cream and that under the compulsion of the job and orders, Petitioner might use the only other available tool—a knife in place of the ice chipper it failed to provide.

The court submitted the case to the jury on well established principles of maritime law; that Respondent owed Petitioner the duty of providing a safe place in which to work, safe and adequate tools to do the work, safe ice cream on which to work, and that Respondent was chargeable with knowledge of the condition of its ice cream; that Petitioner, a seaman, was bound to obey the implied as well as expressed orders of his superiors (R. 95-113).

The Court of Appeals reversed on the sole ground that the use of the knife as an ice chipper, which Respondent failed to supply, "was not within the realm of reasonable foreseeability" (R. 118-119).

ARGUMENT.

I.

The common law doctrine of "reasonable foreseeability" of harm has never before been applied to defeat recovery in a Jones Act case based on a defective appliance or failure to provide an adequate one. In applying the doctrine, the United States Court of Appeals for the Second Circuit has established a new rule of law—which permits a shipowner to supply defective appliances and fail to provide adequate or necessary ones unless he can reasonably foresee harm from his conduct—which is contrary to public policy, decisions of this Court, and other United States Courts of Appeals as well as its own prior decisions.

A shipowner has an absolute non-delegable duty of providing his seamen with safe, adequate and necessary appliances to carry out their work and the exercise of due diligence does not discharge that duty, *Pacific American Fisheries* v. *Hoof*, 9 Cir., 291 Fed. 306, certiorari denied 263 U.S. 712, 44 S. Ct. 38, 68 L. Ed. 520; *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 66 L. Ed. 927, 42 S. Ct. 475; *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262. The duty is recognized by the common law in non-maritime torts, *Mahnich* v. *Southern S.S. Co.* (supra). The duty is a continuing one which lasts all during the seaman's employment, *Pacific American Fisheries* v. *Hoof* (supra); *Cleveland-Cliffs Iron Co.* v. *Martini*, 6 Cir., 96 F. 2d 632. While breach of the duty may be enforced by an action at law for unseaworthiness, *Seas Shipping Co. Inc.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, it also may be enforced by an action for negligence under the Jones

Act, *Socony-Vacuum Oil Co.* v. *Smith* (supra); *Krey* v. *United States*, 2 Cir., 123 F. 2d 1008. As the duty is non-delegable, not discharged by the exercises of due diligence, and is a continuing one, the shipowner's actual knowledge of breach of the duty need not be proved for it is always imputed to him, *Pacific American Fisheries* v. *Hoof* (supra). Therefore, the mere breach of the duty satisfies the negligence requirements of the Jones Act, *Storgard* v. *France & Canada SS Corp.*, 2 Cir., 263 Fed. 545, certiorari denied 252 U.S. 585, 40 S.C. 394, 64 L. Ed. 729; *Krey* v. *United States* (supra). This is so even where the shipowner has surrendered possession and control of his vessel to another, *Standard Oil Co.* v. *Robins Dry Dock & Repair Co.*, 25 F. 2d 339, aff'd 2 Cir., 32 F. 2d 182, and where the defective appliance is set up by an independent contractor, *Shields* v. *United States*, 3 Cir., 175 F. 2d 743. Mere breach of the similar duty to provide a safe place to work satisfies the negligence requirements of the Federal Employers' Liability Act where the injury was sustained on the property of another over which the railroad had neither knowledge nor control, *Terminal R. Ass'n of St. Louis* v. *Fitzjohn*, 8 Cir., 165 F. 2d 473.

To impose an additional element of negligence—"reasonable foreseeability" of harm—in Jones Act appliance cases, is to require proof of actual rather than imputed knowledge and to establish a new and novel rule of law permitting a shipowner to provide a defective appliance and to fail to supply an adequate or necessary one where there is no "reasonable foreseeability" of harm. Such a rule would permit the shipowner to escape liability in many instances for breach of his absolute duty to provide safe, adequate and necessary appliances.

Save for this novel decision of the Court below, we know of no decision in a Jones Act appliance case holding "reasonable foreseeability" of harm a prerequisite of recovery. The authorities cited by the Court below to support its hold-

ing do not do so and are not at all in point. *Manhat v. United States,* 2 Cir., 220 F. 2d 143, ceritorari denied 349 U.S. 966, 75 S. Ct. 900, 99 L. Ed. 1288, did not involve a defective appliance or lack of an adequate one. It was a third party action brought by a repairman who sustained injury when one of his co-employees working inside a lifeboat with him released obvious, safe and proper lowering gear causing the boat to fall. The Court held that such an occurrence could not be foreseen. *Fitzpatrick v. Fowler,* D.C. Cir., 168 F. 2d 172, was a suit by a shoreside domestic servant, for injuries sustained when she tripped and fell in a hole in the floor covering on her working place. The Court held that she assumed the risk because she had knowledge of the defect when injured. In *Wm. Johnson & Co. Ltd. v. Johansen,* 5 Cir., 86 Fed. 886, a seaman was given new, unpliable rope and too short a toggle pin for use in rigging a boatswain's chair which caused it to fall while he was sitting in it and painting the mast. Although the seaman did not question the materials furnished and he could have obtained more suitable material or secured the chair in another way, the Court held he did not assume the risk but was guilty of contributory negligence and halved his damages.

Strangely, 36 years ago in a frequently cited case, *Storgard v. France & Canada S.S. Corp.,* 2 Cir., 263 F. 545, the Court below rejected the very doctrine of "reasonable foreseeability" it now enunciates; there a seaman, in ascending a mast, used a ring attached to a sail; the ring was not designed for that purpose and a defective bolt attached to it caused an injury; the seaman's action was one in negligence for maintaining a defective appliance and the Court of Appeals, in speaking of the shipowner's liability at page 547, said:

> "* * * it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen."

This Court did not apply the doctrine of "reasonable foreseeability" of harm in defective appliance cases clearly calling for its application if it were available to the shipowner, *Socony-Vacuum Oil Co.* v. *Smith* (supra); *Mahnich* v. *Southern S.S. Co.* (supra). In both cases, the shipowner provided a safe appliance and a seaman voluntarily selected an unsafe one, yet in fastening liability on the shipowner for breach of duty, this Court did not even discuss the doctrine.

This Court has often held that the Jones Act is remedial and designed to enlarge the rights of seamen; that in drawing from maritime and common law sources, Courts wherever necessary should liberalize the rules rather than restrict them by a refined process of reasoning or resort to old discredited common law concepts, *Jamison* v. *Encarnacion*, 281 U.S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368; *De Zon* v. *American President Line*, 318 U.S. 660, 63 S. Ct. 814, 87 L. Ed. 1065. It would be an anomaly to permit a duty recognized by the general maritime law and the common law to be watered down and restricted where the Jones Act is invoked to enforce it.

The contributory negligence rule as applied in cases under the Jones Act and the general maritime law gives the shipowner ample protection against the seaman's negligence in selecting a hazardous appliance when a safe one is available or, as here, in using a hazardous tool where a necessary one is not provided, *Socony-Vacuum Oil Co.* v. *Smith* (supra).

The prudent and efficient shipowner can find no burden in fulfilling his absolute duty to provide necessary, adequate and fit appliances for his ship. Certainly he is content to let liability flow from the mere breach of the duty as it always has, for it is not in his interest, that an owner who fails to provide the requisite appliances escape liability because the harm arising out of his breach, in the words of the Court below, "was not within the realm of reasonable foreseeabil-

ity." Such a condition which the Court below has engrafted onto the duty makes it no longer absolute, and impairs the efficiency of our merchant marine in the vital matter of ships appliances by aiding only the careless shipowner, who as we have shown (supra, p. 11) has ample protection against the seaman's carelessness in the contributory negligence rule. The rule pronounced by the Court below is impractical, for the concept of reasonable foreseeability of harm would receive such diverse interpretation from Courts and juries when applied to each of the innumerable appliances aboard ship, that no shipowner could be certain when he had satisfied his legal duty in an appliance case.

2.

The discredited common law simple tool doctrine has no place in Jones Act cases. The shipowner has the same duties and liability with respect to simple tools that he has as to other appliances.

The Court of Appeals did not take notice of the fact that the tool which Respondent failed to provide—an ice chipper—and the tool Petitioner adopted in place of the ice chipper—a knife—were simple tools. In *Jacob* v. *City of New York*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166, this Court apparently discarded the discredited common law simple tool doctrine in Jones Act cases. There the shipowner provided a monkey wrench "probably" adequate for the job but failed to replace a more adaptable type wrench which was worn and defective, after three requests for a new one had been made. A seaman chose the worn wrench and was injured. This Court held that the case should not have been dismissed as the evidence presented a jury question of whether the injury arose out of any "defect or insufficiency, due to its (respondent's) negligence, in its appliances." In reviewing what the

jury might find from the evidence, this Court said it might consider "whether respondent, after it had knowledge of the defect, might not have reasonably foreseen the possibility of resulting harm if it allowed the worn wrench to remain in use." Foreseeability of harm was one of the elements of negligence in the case as the shipowner had provided a wrench which was "probably" adequate for the work, and a request for a new wrench to take the place of the more adaptable but defective one had been made three times; but it was not a necessary element as the shipowners primary negligence consisted in permitting the defective wrench to remain in use; proper inspection would have caused its removal from the working place.

If any vestige of the simple tool doctrine, which developed under different working conditions in shoreside employment, is to be applied in Jones Act cases, certainly it is not the principle that "reasonable foreseeability" of harm is a necessary element of proof where a shipmaster, as here, is so negligent that he fails to provide any adequate appliance for the work. Such a principle would compel the seaman to supply his own tools, a practice which this Court condemned in the *Jacob* case and which is utterly impractical in sea employment, or quit the work which would impair the ship's efficiency and subject him to serious penalties if he is working under orders, *Panama R. Co.* v. *Johnson*, 2 Cir., 289 Fed. 964, aff'd 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748. Certainly a shipowner who fails to provide any adequate simple appliance for the performance of his work is justly chargeable with any harm that may flow from his conduct, whether he can foresee it or not.

3.

The common law doctrine of "reasonable foreseeability" sets up the defense of assumption of risk no longer available in a seaman's appliance case, and obliterates the seaman's traditional and fundamental duty of obedience to orders. Different rules should not be applied in simple tool cases.

The United States Court of Appeals in applying the doctrine of "reasonable foreseeability" in effect held, that although Respondent was negligent in failing to supply an adequate tool the Petitioner assumed the risk when he selected the hazardous knife to do his work. That Court thereby invoked a defense it had previously rejected in *Socony-Vacuum Oil Co.* v. *Smith* (supra). There, in affirming, this Court held that a seaman who "could have avoided the use of the unsafe appliance by the free choice of a safe one" did not assume the risk and said, 305 U.S. at p. 431:

> "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner."

The common law simple tool doctrine rests on the defense of assumption of risk, 3 *Labatte, Master and Servant,*

2nd ed., p. 2479. While *Socony-Vacuum Oil Co.* v. *Smith* did not discuss the simple tool doctrine, although the appliance involved, a defective step plate, might well be classified as a simple tool, the holding impliedly indicates that assumption of risk is not a defense in simple tool cases, for in concluding its opinion, the Court said:

> "We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty."

The facts here demonstrate the injustice of applying the defense of assumption of risk in a simple tool case. Unlike Smith, petitioner had no choice of a safe tool. He had to weigh the alternatives of stopping the work and refusing to fill the order, or using the hazardous knife; and unlike Smith, he did not have a free and uncoerced choice of alternatives because of the orders of his superior, the chef, to give the waiters what they ordered and give them good service, and the order of the waiter for 12 portions of ice cream.

Under the Court's charge (R. 108), the jury verdict is a finding that Petitioner was impliedly ordered to use the knife. He was duty bound to obey such order, *Ruskin* v. *Minnesota Atlantic Transit Co.*, 2 Cir., 107 F. 2d 743. Long before the defense of assumption of risk was abolished by *Socony-Vacuum Oil Co.* v. *Smith* (supra), and later by the *Federal Employers' Liability Act* (35 Stat. 66, 45 U.S.C.A. 54) where injury resulted from negligence, the Court below and this Court held that a seaman did not assume the risk of using a defective appliance in obedience of orders as he is bound to obey them, *Panama R. Co.* v. *Johnson* (supra). But in denying recovery, the Court below necessarily held that a seaman is not duty bound to obey the expressed and implied orders of his superiors if they require the use of a hazardous appliance. This is contrary to bedrock maritime law. In *Dar-*

lington v. *National Bulk Carriers, Inc.*, 2 Cir., 157 F. 2d 817, the same Court affirmed the seaman's duty of obedience to orders and stated, "The cases make it clear that the safety of ships at sea might be seriously endangered were the rule" otherwise. There can be no assumption of risk where a seaman acts in obedience of orders, *Masjulis* v. *U.S. Shipping Board Emergency Fleet Corp.*, 2 Cir., 31 F. (2d) 284.

4.

Implicit in the jury verdict is a finding that Respondent could have anticipated or foreseen that Petitioner would use the knife in his work. In reversing, the United States Court of Appeals refused to respect that finding and thereby deprived petitioner of his right to trial by jury given to him by the Jones Act.

The trial judge did not charge the jury that Petitioner could not recover unless Respondent could have reasonably foreseen that he would use the knife (R. 95-113) and Respondent did not request such a charge (R. 93-94). The trial judge did charge that one of the elements the jury might consider was whether Respondent could have anticipated that Petitioner would use the knife (R. 102). The Court of Appeals refused to accept the jury's affirmative answer to that question and substituted its own finding for that of the jury, in holding that the use of the knife "was not within the realm of reasonable foreseeability"; it thereby usurped the jury's function and deprived Petitioner of the right to trial by jury given to him by the Jones Act. This Court condemned that practice in Jones Act cases in *Jacob* v. *City of New York* (supra) and very recently in *Schultz* v. *The Pennsylvania R. Co.*, 350 U.S. 523, 76 S. Ct. 608, 100 L. Ed. 430. In the *Jacob* case, the Court below affirmed the District Court in refusing to submit to the jury the question of the shipowner's neglect

in failing to replace the more adaptable worn wrench, which was a simple tool and this Court said, 315 U.S. at p. 756:

> "But that is no reason for a court to usurp the function of the jury. We are satisfied that a due respect for the statutory guaranty of the right of jury trial, with its resulting benefits, requires the submission of this case to the jury."

CONCLUSION.

The judgment of the United States Court of Appeals for the Second Circuit should be reversed and the judgment of the District Court of the United States, Southern District of New York, should be reinstated.

Dated: New York, N. Y., October 10, 1956.

Respectfully submitted,

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show that the container of ice cream was brought up as customary from a freezing compartment, between 1:00 and 2:00 p. m. on the day of the accident and placed in a special chill box designed to hold the ice cream for service (D. App. 29, 55-58). No evidence was offered as to the temperature of this dispensing chest, though it was established that the temperature of the refrigerator on D deck was five below zero.

The deposition of Sam Shaffran, the chief refrigerating engineer of the SS BRAZIL at the time of the accident, was read by petitioner's counsel. Shaffran testified he could not remember trouble with any of the refrigerating machinery on the day of the accident and he had no record of any such trouble (D. App. 10-13). He stated, however, that any defects always resulted in higher temperature and, hence, softer ice cream (D. App. 12). Petitioner himself said that there never was an occasion when the ice cream became harder rather than softer in the ice cream chest. He said, "The heat of the box didn't cause the ice cream to get hard, it caused it to get soft" (D. App. 71).

There was no evidence that petitioner, either expressly or impliedly, was ever ordered to serve hard ice cream. And, significantly, there was no evidence that any of the ship's supervisory personnel ever knew of the use of a knife for such purpose, a practice described by petitioner himself as improper (D. App. 61).

On this record the Court of Appeals pointed out that there is here no claim of unseaworthiness, that petitioner had been furnished a standard ice cream scoop, that the knife which was used was in no way defective, that it was never designed for or intended to be used as a dagger or an ice pick and that there was no reason for respondent to anticipate that it would be put to such use. The Court then held:

"There being no proof of fault on the part of the shipowner, defendant's motion for a directed verdict should have been granted" (Pet. 16).

Argument

The finding of the Court of Appeals is supported by all the evidence in the case and is clearly correct. No substantial legal question or conflict of decisions is presented. Review by this Court is, therefore, unwarranted.

POINT I

THE COURT OF APPEALS CORRECTLY RULED THAT THERE WAS NO FAULT ON THE PART OF THE SHIPOWNER AND THAT, CONSEQUENTLY, IT WAS NOT LIABLE UNDER THE JONES ACT.

This action is brought under the Jones Act and not under general maritime law relating to unseaworthiness (Pet. 3; D. App. 94).

The gist of an action under the Jones Act is negligence. In order to maintain action under the Act, the seaman must allege and prove negligence of the owner of the vessel, or her officers, agents or employees. *Jamison* v. *Encarnacion*, 281 U. S. 635; *De Zon* v. *American President Lines, Ltd.*, 318 U. S. 660.

Petitioner contends, however, that the shipowner has an absolute duty to anticipate and provide against negligence on the part of the petitioner himself and that the shipowner is absolutely liable for injuries caused by fortuitous or negligent action of petitioner regardless of the safeness and reliability of the appliance or working conditions furnished by the ship. In practical terms, this amounts to holding a shipowner an insurer for all shipboard injuries, an unprecedented basis for maritime indemnity. Decisions cited by petitioner were all holdings that shipowner is liable

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955
No. ~~831~~ 59

HENRY FERGUSON,
Petitioner,

v.

MOORE-McCORMACK LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CASES

POINT II

THE DECISION OF THE COURT OF APPEALS INVOLVES NO CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

The holding of the Court of Appeals that under the Jones Act there is no liability without fault is in accordance with express provisions of the pertinent statutes. There is no case which holds to the contrary.

Here there was no evidence of any breach of duty or of any defective appliances. On the contrary, petitioner was furnished with the usual and customary tools of the trade which were in good order and condition. The sole cause of the accident was the rash and imprudent action of petitioner himself in picking up a sharp knife and then using it in a manner for which a knife was never intended. To expect respondent's agents or servants to foresee anyone using such a tool, which petitioner admits was improper, and to use it in such a manner, is to argue an omniscience quite superhuman.

There was no evidence upon which the jury could properly find a verdict for petitioner.

The Court of Appeals was clearly correct in ruling that respondent's motion for a directed verdict should have been granted.

Conclusion

For the foregoing reasons, it is respectfully submitted that Petition for Writ of Certiorari should be denied.

WILBUR E. DOW, JR., ESQ.
FREDERICK FISH, ESQ.
Counsel for Respondent

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

HENRY FERGUSON, *Petitioner,* v. MOORE-McCORMACK LINES, INC., *Respondent.*	No. 831

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

No opinion was rendered in the District Court.

The opinion of the Court of Appeals for the Second Circuit (Appendix to Petition, p. 15) is reported at 228 F. 2d 891.

Question Presented

The real question presented is whether the Court of Appeals was correct in holding a shipowner not responsible for cuts sustained by a ship's baker on the grounds that it was not within the realm of reasonable forseeability that the baker, who had been supplied with a usual ice cream scoop in good condition, for use in serving ice cream, would use a razor-sharp butcher's knife, without a guard, as a dagger to stab ice cream which he had found to be hard.

Statutes Involved

This action is brought under the Jones Act, 41 Stat. 1007, 46 U. S. C. 688, which incorporates the Federal Employer's Liability Act, 35 Stat. 65, 45 U. S. C. 51.

The Jones Act provides, 41 Stat. 1007, 46 U. S. C. 688, in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ."

The Federal Employer's Liability Act provides, 35 Stat. 65, 45 U. S. C. 51, in part as follows:

> "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Statement

The testimony of petitioner was that, on March 27, 1950, between 8 p. m. and 8:40 p. m. when the accident occurred, he was engaged in serving ice cream in the vessel's galley on C deck out of a 2½ gallon container

(D. App. 16, 20).* Prior to the accident petitioner had served a half-used tub and half of another tub of ice cream using a standard ice cream scoop which shaped the dessert into a ball (D. App. 20-22). It is undisputed that this scoop was the usual implement furnished for serving ice cream ashore or afloat and that it was in good condition (D. App. 79). When over half-way down the second container, petitioner found the ice cream to be harder towards the center and bottom of the tub and difficult to scoop out. Petitioner then picked up a razor-sharp butcher knife, eighteen inches long, kept under a grill nearby, which he knew was used for cutting French bread, and proceeded to loosen the ice cream by holding the knife in his fist, sharp edge outside, stabbing and pounding at the ice cream (D. App. 23). This knife had no guard between the handle and the blade similar to the flange or guard found on a French knife (D. App. 61). Petitioner knew it was improper to use a butcher knife in this manner (D. App. 61). The knife itself was in good condition. Petitioner testified that on one jab the point of the knife hit an extra-hard bit of ice cream and the jolt caused his hand to slip down from the handle of the knife on to the blade, badly cutting his third, fourth and fifth fingers (D. App. 16, 17).

It is claimed that the ice cream was not properly softened because of defects in the refrigerating machinery or because the storage chest was too cold. There was, however, no testimony to this effect and there was no testimony that there was any trouble whatever with any of the machinery or with the dispensing chest on the day in question (see, D. App. 29). Testimony of petitioner merely tended to

*Numerals following the letters "D. App." in parentheses refer to pages in defendant-appellant's appendix in the Court of Appeals which has been filed here.

for failure to provide a safe place to work because of a faulty appliance or a structural defect of the vessel. *Pacific American Fisheries* v. *Hoof*, 291 Fed. 306 (C. A. 9) (fastenings of ladder missing); *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255 (gasoline in coal oil can); *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (defective rope used in rigging staging); *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (defective step); *Jacob* v. *City of New York*, 315 U. S. 752 (worn and defective wrench).

While there may be liability without fault under the doctrine of unseaworthiness for injuries caused by defective appliances, *The Osceola*, 189 U. S. 158, no case has been cited by petitioner which holds that liability may be imposed under the Jones Act without proof of negligence. There is no case which so holds. Cases holding that under the Jones Act there is a non-delegable duty to provide a safe place to work go no further than to hold the shipowner responsible for the negligence of a person to whom the duty, in fact, has been entrusted.

Even under the doctrine of unseaworthiness, the Court has recently held that "warranty of seaworthiness does not mean that the ship can weather all storms" but only that it be "reasonably fit" for the purpose at hand and that "the problem (of unseaworthiness) as with many aspects of the law, is one of degree". *Boudoin* v. *Lykes Bros. Steamship Co., Inc.*, 348 U. S. 336, 339, 340. Accordingly, the shipowner has never been held obligated to provide an accident-proof ship, *Lake* v. *Standard Fruit and Steamship Co.*, 185 F. 2d 354 (C. A. 2), but only to furnish reasonably safe or adequate tools and working conditions. *Doucette* v. *Vincent*, 194 F. 2d 834 (C. A. 1); *Berti* v. *Compagnie de Navigation Cyprien Fabre*, 213 F. 2d 397 (C. A. 2); cf. *Jacob* v. *City of New York*, 315 U. S. 752, 758, where the

Court said "Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable". In the *Jacob* case, a seaman was injured due to the slipping of a worn and defective wrench, the seaman previously having made repeated requests for a replacement of the wrench.

In the present case, there was no evidence whatever of unseaworthiness, and it was, of course, for this reason that petitioner's experienced counsel founded his claim solely on the provisions of the Jones Act.

Petitioner contends further that the common law doctrine of "reasonable foreseeability" of harm may not be applied in a Jones Act case (Pet. 6). It should be noted that the present case does not involve an injury directly resulting from a defective appliance. Any mal-function of the ice cream serving chest could only have resulted in soft, not hard, ice cream. The ice cream scoop that was provided and the knife that was used were both in good condition. As there was no direct connection between the usual appliances which were furnished by respondent and the accident, the question of determination of negligence, therefore, became one of whether there was any reasonable apprehension of danger by reason of the hardness of the ice cream, even assuming that it could have been found that respondent should have known of the hard condition (and there was no evidence in this case to support such conclusion). *Manhat* v. *United States,* 220 F. 2d 143, 147 (C. A. 2), certiorari denied, 349 U. S. 966. In the *Manhat* case, a ship at a pier was undergoing repairs. A lifeboat had been swung outboard on davits but was unsecured other than by falls. Plaintiff, at work in the boat with others, was injured when the boat fell to the pier. This must have been caused by the activation of the releasing

gear, which itself was in good condition, by plaintiff's fellow workman. It was claimed that the shipowner was negligent in that a dangerous situation was created when the boat was swung out without special extra lashings. As to this, the Court said:

> ". . . the prospect of the falling of a lifeboat under the circumstances presented here did not possess those elements of reasonable foreseeability which would impel the conclusion that reliance upon the Rottmer-type releasing gear constituted a failure to exercise that degree of care which could be expected of a reasonable man."

The significance of foreseeability and the necessity of apprehension of danger as a necessary element in determining the degree of care which may be expected of a reasonable man has been recognized by this Court in other cases involving maritime injuries. *Jacob* v. *City of New York*, 315 U. S. 752; *Jamison* v. *Encarnacion*, 281 U. S. 635.

Finally, petitioner has argued that the Court of Appeals has applied the defense of assumption of risk, which is no longer available in seamen's cases. This argument is wholly without merit, for the problem of affirmative defense does not arise until liability for negligence has been established. The opinion of the Court of Appeals makes it perfectly clear that petitioner has failed because there was "no proof of fault on the part of the shipowner" (Pet. 16).

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The Jones Act provides in part as follows:

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The Federal Employer's Liability Act provides in part as follows:

> "Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The Question Presented

The question presented is whether the Court of Appeals was correct in holding that there was no substantial evidence of negligence on the part of a shipowner in a case where a ship's baker, who had been supplied with the customary implement, in good condition, for serving ice cream, chose to use a razor-sharp butcher's knife, without a guard, as a dagger to stab and pound ice cream which he had found to be hard.

Statement of the Case

Petitioner brought a civil jury action under the Jones Act for personal injuries alleged to have been sustained by petitioner on March 27, 1950 by reason of respondent's negligence while petitioner was employed by respondent as a baker on board the steamship BRAZIL.

At the close of petitioner's case in the Trial Court respondent moved for a directed verdict, which was denied. The respondent then rested, and requested a charge as follows:

> "15. Defendant was not required for plaintiff's benefit to exercise vigilance to see that plaintiff did

> not use a dangerous implement in a manner for which it was not intended or designed" (R. 94).

The Trial Court declined to charge the jury as requested, and respondent duly objected to this refusal (R. 114-115). Following the charge of the Trial Court, the jury returned a verdict for the petitioner.

Before summation and again following the verdict respondent renewed the motion for a directed verdict. Respondent also moved that the verdict be set aside on the grounds that it was excessive and against the weight of the evidence. Motion was also made in the alternative for a new trial. The Trial Court denied all these motions.

Petitioner thereupon appealed to the Court of Appeals for the Second Circuit. The judgment for petitioner was reversed on the grounds that:

> "There being no proof of fault on the part of the shipowner, defendant's motion for a directed verdict should have been granted" (R. 119).

Summary of Facts

The testimony of petitioner was that on March 27, 1950, between 8:00 p. m. and 8:40 p. m. he was occupied in the galley of the S. S. BRAZIL, on C-deck, serving ice cream from a 2½ gallon container (R. 38, 41, 42). Before the accident petitioner had served a half-used tub and half of another tub of ice cream using a standard ice-cream scoop which shaped the dessert into a ball (R. 42, 43). It is undisputed that this scoop was the usual implement furnished for serving ice cream ashore or afloat and that it was in good condition (R. 42, 72). When over half-way down the second container, petitioner found the ice cream to be harder towards the center and bottom of the tub and difficult to scoop out. Petitioner then picked up a razor-sharp

butcher knife, 18 inches long, kept under a grill nearby, which he knew was used for cutting French bread, and proceeded to loosen the ice cream by holding the knife in his fist, sharp edge outside, stabbing and pounding at the ice cream (R. 44). This knife had no guard between the handle and the blade similar to the flange or guard found on a French knife (R. 61). Petitioner knew it was improper to use a butcher knife in this manner (R. 61). The knife itself was in good condition. Petitioner testified that on one jab the point of the knife hit an extra-hard bit of ice cream and the jolt caused his hand to slip down from the handle of the knife on to the blade, badly cutting his third, fourth and fifth fingers (R. 39).

It is claimed that the ice cream was not properly softened because of defects in the refrigerating machinery or because the storage chest was too cold. There was, however, no testimony to this effect and there was no testimony that there was any trouble whatever with any of the machinery or with the dispensing chest on the day in question (see, R. 49). Testimony of petitioner merely tended to show that the container of ice cream was brought up as customary from a freezing compartment, about 1:00 p. m. on the day of the accident, and placed in a special chill box designed to hold the ice cream for service (R. 50). No evidence was offered as to the temperature of this dispensing chest, though it was established that the temperature of the refrigerator on D-deck was five below zero.

The deposition of Sam Shaffran, the chief refrigerating engineer of the BRAZIL at the time of the accident, was read by petitioner's counsel. Shaffran testified he could not remember trouble with any of the refrigerating machinery on the day of the accident and he had no record of any such trouble. He stated, however, that any defects always resulted in higher temperature and, hence, softer ice cream (R. 29). Petitioner himself said that there never was an

occasion when the ice cream became harder rather than softer in the ice-cream chest. He said, "The heat of the box didn't cause the ice cream to get hard, it caused it to get soft" (R. 65).

Testimony of a dairy expert as to ice cream at various temperatures was not relevant since the temperatures of the dispensing chest was never established. The degree of softness or hardness of the ice cream would be directly affected by the temperature of the dispensing chest where it was stored for over six hours.

Petitioner testified that he had known the knife was for the purpose of cutting French bread and specifically admitted that he knew it was an improper tool for loosening ice cream (R. 61). Petitioner had given a deposition in 1950, shortly after the accident, which conflicted with his testimony at the trial; he admitted that his recollection five years before was apt to be more accurate than his present testimony (R. 53). In his deposition petitioner said he never used the knife to serve ice cream before and that the third baker had only used it to cut bread (R. 69, 92). At trial petitioner said both he and the third baker had used the knife previously to serve ice cream on other occasions (R. 69, 92) but, significantly, he failed to testify that this was known to any of the ship's supervisory personnel.

There was no evidence that petitioner, either expressly or impliedly, was ever ordered to serve hard ice cream.

Argument

This action was brought under the Jones Act where the gist of an action is negligence (R. 91. See "Statement", Petitioner's Brief at p. 4). No claim has been made, nor is now made, that respondent's ship or any of its appliances or equipment were unseaworthy. Doctrines of absolute liability, or liability without fault, which pertain to cases of unseaworthiness have no application here.

The burden was upon petitioner to present substantial evidence of fault on the part of respondent. In the absence of any such evidence he was not entitled to go to the jury. No question of any special affirmative defense such as assumption of the risk or contributory negligence could arise until petitioner first established his basic premise of negligence on the part of respondent.

The Court of Appeals did not rely on any special defense of respondent. It considered only the basic question of negligence. Its finding that there was no evidence of negligence on the part of respondent was dispositive of the case.

That finding was clearly correct.

POINT I

THERE WAS NO EVIDENCE THAT RESPONDENT WAS NEGLIGENT BY REASON OF ANY DEFECTIVE MACHINERY.

Petitioner opened his case in the Trial Court by reading into the record a deposition made by the chief refrigeration engineer of the S. S. Brazil, Sam Shaffran. Far from showing defective machinery, Mr. Shaffran could not recall any refrigerating machinery being defective the day of the accident. He also testified that any defects that might be encountered would result in higher, rather than lower, temperatures and hence soft, rather than hard, ice cream.

Petitioner testified next. He said that he thought the ice cream cabinet was not working properly the day of the accident since he had seen the refrigeration engineer "tinkering around it" (R. 12). However, on further questioning it appeared the engineer might have been only inspecting it as customary, rather than making repairs. Petitioner also testified on cross-examination as follows:

> "Q. (by Mr. Sheneman, respondent's counsel) You told us that the ice cream boxes do not operate

properly from time to time or did not operate properly from time to time. A. That's right.

"Q. Was there ever an occasion when the ice cream in the box became harder rather than softer when the ice cream chest was not operating properly? A. No. The heat of the box didn't cause the ice cream to get hard, it caused it to get soft, and it had to be taken back down in the deep freeze." (R. 65).

Thus it is quite apparent that any defect would have ameliorated the condition of the ice cream complained of, and that daily inspections by the refrigerating engineer were sufficient and reasonable for keeping the machinery in repair.

POINT II

THERE WAS NO EVIDENCE THAT RESPONDENT HAD ANY REASON TO ANTICIPATE DANGER TO THE PETITIONER BY REASON OF THE DEGREE OF HARDNESS OF THE ICE CREAM PETITIONER WAS SERVING.

Petitioner's position that respondent negligently failed to furnish petitioner with a safe place to work in that some of the ice cream near the bottom of a tub was found to be hard presupposes that hard ice cream is dangerous or unsafe. This, respondent respectfully submits, is contrary to plain fact and common sense. Petitioner quite successfully served a half-tub and a half of a full tub of ice cream that had been in the ice cream cabinet for more than six hours, the customary time. There is nothing dangerous about digging out ice cream with a scoop provided for the purpose. It is only when the server on his own initiative attempts to hack it out with a razor-sharp knife that any possibility of an accident arises. To expect respondent's agents or servants to foresee anyone using such a tool, which petitioner himself admits was improper, and to use it in an improper manner is to

argue an omniscience quite superhuman and a result completely remote as a possible consequence to the condition of hardness of the ice cream.

Negligence involves "recognizable risk of harm". The conditions which are necessary to make an act negligent in respect to the harm of which another has complained are summarized in Restatement of the Law, Torts, §§ 281 (b), 430 at page 1157 as follows:

> "The actor's conduct, to be negligent toward another, must involve an unreasonable risk of—
>
> "1. causing harm to a class of persons of which the other is a member and
>
> "2. in certain cases, subjecting the other to the hazard from which the harm results."

These principles were cited with approval in *Marengo* v. *Roy,* 318 Mass. 719. And in *Packwood* v. *Briggs & Stratton Corp.,* 195 F. 2d 971, the Court of Appeals for the Third Circuit said, p. 972:

> "Jury findings of negligence or proximate cause must comport with common law rules devised to give reasonable and systematic meaning to those generalities. For such rules, see Restatement of the Law, Torts, Negligence, Chs. 12-16. And so it is throughout the body of the common law. This authority and responsibility to keep jury findings within reasoned rules and standards is an essential function of United States judges today as it long has been of common law judges. See Capital Traction Co. v. Hof, 1899, 174 U. S. 1, 13-16, 19 S. Ct. 580, 43 L. Ed. 873. It stands as a great safeguard against gross mistake or caprice in fact finding."

In *Freightways, Inc.* v. *Stafford,* 217 F. 2d 831 (8 Cir.), it was said at page 836:

> "One cannot ordinarily be charged with negligence for failing to anticipate negligence on behalf of another."

The requirement of some foreseeability of danger as an essential element of negligence is clearly set forth in *Manhat* v. *United States,* 220 F. 2d 143, cert. den., 349 U. S. 966. In this case, a ship at a pier was undergoing repairs. A lifeboat had been swung outboard on davits but was unsecured other than by falls. Plaintiff, at work in the boat with others, was injured when the boat fell to the pier. This must have been caused by the activation of the releasing gear, which itself was in good condition, by plaintiff's fellow workman. It was claimed that the shipowner was negligent in that a dangerous situation was created when the boat was swung out without special extra lashings. As to this, the Court said at page 147:

> "... the prospect of the falling of a lifeboat under the circumstances presented here did not possess those elements of reasonable foreseeability which would impel the conclusion that reliance upon the Rottmer-type releasing gear constituted a failure to exercise that degree of care which could be expected of a reasonable man."

The significance of foreseeability and the necessity of apprehension of danger as a necessary element in determining the degree of care which may be expected of a reasonable man has been recognized by this Court in other cases involving maritime injuries. *Jacob* v. *City of New York,* 315 U. S. 752; *Jamison* v. *Encarnacion,* 281 U. S. 635.

Assuming *arguendo,* however, that, by some stretch of the imagination, hard ice cream is a dangerous condition, certain prerequisites must be met before respondent can be charged with negligence. Nothing is clearer as a matter of law than the necessity of defendant's knowledge or notice of the condition alleged to be dangerous. Unless the respondent had actual or constructive notice of the condition so as to furnish it with an adequate opportunity to remedy the condition then there is not a cause of action for neg-

ligence under the Jones Act. *Boyce* v. *Seas Shipping Co.*, 152 F. 2d 653 (2 Cir. 1945); *Anderson* v. *Lorentzen*, 160 F. 2d 173 (2 Cir. 1947); *Lauro* v. *United States*, 162 F. 2d 32 (2 Cir. 1948); *Adamowski* v. *Gulf Oil Corporation*, 93 F. Supp. 115 (E. D. Pa. 1950), 197 F. 2d 523 (3 Cir. 1952); *Holliday* v. *Pacific Atlantic S. S. Co.*, 99 F. Supp. 173 (D. Del. 1951), reversed on other grounds 197 F. 2d 610 (3 Cir. 1952), cert. den. 345 U. S. 922; *Shannon* v. *Union Barge Line Corp.*, 194 F. 2d 584 (3 Cir. 1952), cert. den. 344 U. S. 846; *Daniels* v. *Pacific Atlantic S. S. Co.*, 120 F. Supp. 96 (E. D. N. Y. 1954).

A search of the record reveals that at no time did petitioner, or anyone else, complain about or ever mention the condition of the ice cream to his immediate superiors or fellow workers. Such knowledge is a necessary part of petitioner's *prima facie* case as is clearly shown in his complaint. The burden was on the petitioner to prove a *prima facie* case and that burden was not sustained.

POINT III

THERE WAS NO EVIDENCE THAT RESPONDENT FAILED TO FURNISH PETITIONER WITH PROPER TOOLS.

The final possibility of negligence to be charged to the respondent is the use of the razor-sharp knife by the petitioner in digging out the ice cream. Assuming respondent should anticipate the ice cream would be hard on occasion, was respondent negligent in not supplying proper tools? A negative answer has been given by a number of courts in similar cases.

In *Neville et al* v. *American Barge Line Co.*, 105 F. Supp. 405 (W. D. Pa. 1952) a laundress attempted to open a can of milk with a butcher's cleaver rather than a can opener. The court found on these facts that no negligence

could be imputed to the shipowner. In *Cruz* v. *American Hawaiian Steamship Co.*, 1953 A. M. C. 1528 (City Court, New York, not officially reported) the Court said: "All the defendant is required to furnish are tools or appliances which are reasonably suitable and adequate for that purpose." There the libelant messman cut himself while paring vegetables with a butcher knife which was supplied to him for the purpose. He contended a proper salad knife should have been provided. Suit was dismissed for failure to show a cause of action.

The District Court of Massachusetts held in 1951 that "an instrumentality properly used aboard the vessel for one purpose cannot be changed into a dangerous instrumentality by reason of a custom of carelessness and neglect on the part of those who use the instrumentality." *Christiansen* v. *United States of America, et al,* 94 F. Supp. 934 (D. Mass. 1951).

A master is not liable in negligence where a servant is injured in the use of a tool which is without defect if the servant has complete knowledge of and is experienced in the use of such tool. In a recent case directly in point a seaman was ordered to do a job and he himself chose improper tools that resulted in injury. The Court found on the undisputed evidence that the employee alone exercised control over the operations, that he was given the choice of proper and safe tools and chose badly. *Pearson* v. *Tide Water Associated Oil Co. Inc.*, 223 P. 2d 669 (Cal. Ct. of App. 1950, not officially reported).

Respondent requested the Trial Court to make the following charge:

> "Defendant was not required for plaintiff's benefit to exercise vigilance to see that plaintiff did not use a dangerous implement in a manner for which it was not intended." (R. 94)

The Trial Court refused to charge the jury as requested and, under Rule 52 of the Federal Rules of Civil Procedure, respondent made timely objection to that refusal (R. 114). This charge was correct in law and pertinent to the facts and issues in the case. The charge requested was in no way covered in the Court's instructions; plaintiff's counsel specifically objected to its inclusion (R. 114). The Court's refusal to so charge was erroneous and most prejudicial to the respondent.

No question exists that petitioner was supplied with a mechanical scoop in perfectly good condition and specifically designed for serving ice cream. Petitioner chose to hurry the process by taking a knife that was kept under a grill nearby and using it to loosen the ice cream. Petitioner was standing in a galley equipped to serve 500 passengers but he testified that there was no other instrument on the ship other than an 18-inch razor-sharp knife suitable for loosening ice cream! What actually happened is quite obvious. Petitioner had observed the third baker nearby, cutting bread with a sharp knife. When he wanted some utensil to loosen the ice cream, he chose the course of least resistance and took the bread knife from the grill and used it. He could easily have stepped into the next compartment and taken a large spoon with adequate leverage (Defendant's Exhibit A; R. 65, 66, 77, 78); he could have obtained a large fork or even a French knife with an adequate guard at the handle. Instead he decided to use the sharp bread knife with its unguarded blade, and now he seeks to charge respondent with the consequences of his own negligence.

For the first time, at the trial, petitioner alleged that he should have been furnished an ice chipper. This is a bar tool, not a galley tool. It is, as its name indicates, used for ice, not for a confection such as ice cream. As stated by the Trial Court (R. 46), it is used for making highballs. There undoubtedly were several in the ship's bars, and

undoubtedly petitioner could have had one if he had asked for one. It is most significant that petitioner did not testify that he had asked for one, that there was none available, or that he had ever notified any superior that he needed such an implement. There was no evidence whatsoever that its use on ice cream was usual or customary or even known. The ice chipper stands on no different basis than any of a dozen or more implements that could have been used safely to make holes in ice cream. The case remains not one where respondent was negligent, but rather one where petitioner seeks to charge respondent with the consequences of his own negligence.

Again, assuming *arguendo* that any of the above possibilities were negligent acts or omissions by the respondent, and omitting the question of knowledge or notice, we cannot conclude that the events alleged by petitioner as negligence were the proximate cause of the accident. No reasonably prudent employer could have foreseen that hard ice cream might cause a serious accident where an ice cream scoop in perfect working order had been supplied. There is here no chain of causation culminating finally and inevitably in the accident. The sole and proximate cause of the accident was petitioner's decision to reach under a grill and pick up a dangerous and improper tool to hurry the process of serving ice cream. On digging down toward the bottom of the tub petitioner discovered the ice cream to be hard and was, indeed, the only person with that knowledge, or who had occasion to have such knowledge. He had no order to serve ice cream come what may, nor was he caught up inextricably in a fast moving set of circumstances. Given the condition of the ice cream at that moment, no dangerous condition existed. With adequate time for deliberation, petitioner, by his own decision, became an independent intervening cause directly resulting in an accident through his own gross negligence.

"Q. Then would you say the knife that you used on this particular occasion was improper. A. That's right.

Q. What was the purpose of this knife? A. They used it for to cut French bread.

Q. It wasn't put there to serve ice cream, was it? A. No.

Q. It was in the bake shop for the use of the baker in cutting French bread? A. That's right." (R. 61)

Petitioner had been a baker since 1910 and had been at sea since 1945 after a long period ashore. He was familiar with all the types of utensils available in a galley equipped to serve 500 passengers.

Petitioner had a number of choices. He could have continued serving with the ice-cream scoop by exerting a little more effort and scraping with the edge. Far better, he could have complained of his difficulties to his immediate superiors and received instructions as to what to do. The respondent is not an insurer of plaintiff's safety. The law does not require the shipowner to supply the best or perfect equipment and appliances but only those that are reasonably safe and suitable. *Doucette* v. *Vincent*, 194 F. 2d 834 (1 Cir. 1952); *The Crickett*, 71 F. 2d 61 (9 Cir. 1934); *Ruberry* v. *United States*, 94 F. Supp. 683 (E. D. Mich. 1950).

Before a case may go to the jury, sound probative evidence should be available for their consideration. This Court stated the rule in *Gunning* v. *Cooley*, 281 U. S. 90, at p. 94:

> "A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether

> there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' *Improvement Company* vs. *Munson,* 14 Wall. 448. *Pleasants* vs. *Fant,* 22 Wall. 116, 122."

And in *Brady* v. *Southern Railway Company,* 320 U. S. 476, it was said, at p. 479:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

Such is the case at bar. Petitioner has alleged that the ice cream was hard, but this was a temporary condition not dangerous *per se* and unknown to the respondent. Petitioner admitted that he had been supplied with an ice cream scoop in good working order, and that he used, in an improper manner, a knife which he knew to be improper and which was not in the galley for serving ice cream. Petitioner has not alleged or proved any facts whatsoever from which the jury could have possibly found negligence on the part of anyone other than petitioner himself.

POINT IV

THE DECISION OF THE COURT OF APPEALS INVOLVES NO NOVEL POINT OF LAW AND IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER COURT.

The holding of the Court of Appeals that under the Jones Act there is no liability without fault is in accordance

with the express provisions of the pertinent statutes. *Jamison* v. *Encarnacion*, 281 U. S. 635; *DeZon* v. *American President Lines, Ltd.*, 318 U. S. 660. There is no case which holds to the contrary.

Petitioner's case is based essentially on claims that respondent furnished defective appliances and that in any event there is an absolute liability which rests upon respondent.

We have already shown that on petitioner's own testimony the appliances he had and used were in *perfect good order and condition.*

The claim as to absolute liability is premised upon unsafe working conditions. This, too, is without any support whatever in the testimony. In any event, the doctrine of liability without fault has no place in a Jones Act case.

Petitioner further contends, however, that the shipowner has an absolute duty to anticipate and provide against negligence on the part of the petitioner himself and that the shipowner is absolutely liable for injuries caused by fortuitous or negligent action of petitioner regardless of the safeness and reliability of the appliance or working conditions furnished by the ship. In practical terms, this amounts to holding a shipowner an insurer for all shipboard injuries, an unprecedented basis for maritime indemnity. Decisions cited by petitioner were all holdings that shipowner is liable for failure to provide a safe place to work because of a faulty appliance or a structural defect of the vessel. *Pacific American Fisheries* v. *Hoof*, 291 Fed. 306 (9 Cir.) (fastenings of ladder missing); *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255 (gasoline in coal-oil car); *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (defective rope used in rigging staging); *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (defective step); *Jacob* v. *City of New York*, 315 U. S. 752 (worn and defective wrench).

While there may be liability without fault under the doctrine of unseaworthiness for injuries caused by defective appliances, *The Osceola,* 189 U. S. 158, no case has been cited by petitioner which holds that liability may be imposed under the Jones Act without proof of negligence. There is no case which so holds. Cases holding that under the Jones Act there is a non-delegable duty to provide a safe place to work go no further than to hold the shipowner responsible for the negligence of a person to whom the duty, in fact, has been entrusted.

Even under the doctrine of unseaworthiness, the Court has recently held that "warranty of seaworthiness does not mean that the ship can weather all storms" but only that it be "reasonably fit" for the purpose at hand and that "the problem (of unseaworthiness) as with many aspects of the law, is one of degree". *Boudoin* v. *Lykes Bros. Steamship Co., Inc.,* 348 U. S. 336, 339, 340. Accordingly, the shipowner has never been held obligated to provide an accident-proof ship, *Lake* v. *Standard Fruit and Steamship Co.,* 185 F. 2d 354 (2 Cir.), but only to furnish reasonably safe or adequate tools and working conditions. *Doucette* v. *Vincent,* 194 F. 2d 834 (1 Cir.); *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. 2d 397 (2 Cir.); cf. *Jacob* v. *City of New York,* 315 U. S. 752, 758, where the Court said "Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable". In the *Jacob* case, a seaman was injured because of the slipping of a worn and defective wrench which was of the type best suited for the job and which was usually used for the purpose, the seaman previously having made repeated requests for a replacement of the wrench.

In the present case, there was no evidence whatever of unseaworthiness, and it was, of course, for this reason that petitioner's experienced counsel founded his claim solely on the provisions of the Jones Act.

There is no reason to discuss the "simple tool" doctrine for, as stated, in petitioner's brief, p. 12, the Court of Appeals did not rely on this doctrine and did not refer to it. As petitioner agrees that his tools were not defective, the doctrine has no application.

There is also no need for discussion of contributory negligence or assumption of the risk. Before any such questions can arise there must be a finding of fault on the part of the shipowner. The Court of Appeals could not have stated the basis for its decision more clearly: "There being no proof of fault on the part of the shipowner . . .".

The subjects of contributory negligence and assumption of the risk were never reached.

CONCLUSION

It is respectfully submitted that the judgment of the United States Court of Appeals for the Second Circuit is correct and should be affirmed.

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